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CONTENTS.

An Action at Law : being an Outline of the Jurisdiction of the Superior Courts of Common Law, with an Elementary View of the Proceedings in Personal Actions and in Ejectment. By Robert Malcolm Kerr, Barrister-at-Law.

Criminal Process : or, A View of the Whole Proceedings Taken in Criminal Prosecutions, from Arrest to Judgment and Execution: Intended as an Introduction to the Study and Practice of Crown Law. By Henry R. Dearsly, Esq., of the Middle Temple, Barrister-at-Law.

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PREFACE.

IN the compilation of the following pages, my intention has been to present to the reader "An Elementary View of the Proceedings in Personal Actions and in Ejectment."

I have endeavoured to trace simply and concisely the successive steps in these actions, as the proceedings therein are regulated by the Common Law Procedure Act, 1852, the Rules of Practice framed under its provisions, and the Pleading Rules of Trinity Term, 1853. With the numerous changes effected by that statute, or by the not less important Rules of Court, the professional lawyer can only make himself familiar by long and careful study. I venture to hope, that the analysis of these changes which I offer in this volume may not be found inopportune.

While engaged in the preparation of the work, it was suggested to me, that such a treatise as the present might be made exceedingly useful to students, were it so far enlarged as to give an outline, not only of the proceedings in Actions, but of the constitution of the Superior Courts, and the matters which come within their cognizance. In acting on this suggestion, I have adopted, in the Second Part of the work, that logical treatment of the subject of private injuries which is to be found in the pages of Sir William Blackstone; and, in many parts of the volume, I have used his very words. I think it necessary thus to point out the source from which I have drawn part of my materials, that neither the professional reader nor the student may attribute to the treatise a want of originality. In works of this kind, indeed, originality is out of the question; all that can be expected from an author is, that he shall compile judiciously, so as to avoid redundancy, and carefully, so as to be free from error.

The chief purpose of the volume being to explain the proceedings in

Personal Actions and in Ejectment, the chapters describing the injuries for which the law has afforded remedies, and the Courts in which those remedies are administered, are only introductory to the delineation which has been attempted of the various proceedings in those actions.

I am aware that, in many places, I have been more elementary than some readers may, perhaps, think desirable ; but I had no other alternative than to start at once with a description of the different forms of Action in use in the Superior Courts, without previously explaining how those forms came to be adopted. There are other portions of the treatise in which the law relating to the subject has been touched upon but slightly ; as, for instance, the injuries sustainable by the Sovereign from a subject, or by a subject from the Sovereign, with their appropriate remedies. Again, there are many of the ordinary proceedings in the Courts of Westminster which have been little more than alluded to. This was unavoidable, unless the treatise was to be extended to one on the general practice of the law, a character to which it does not make the slightest pretension.

R. M. K.

Temple,
December, 1853.

CONTENTS.

The pages referred to are those between brackets [].

Preface	iii
Contents	v

INTRODUCTION.

Private wrongs, and the different modes of redress given by Law	1
CHAP. I.—Redress by act of the Parties.	
S. 1. Redress by the act of the Party injured.	
Self-Defence; Recaption; Entry on Lands; Abatement of Nuisances; Distress; Seizing of Heriots	2
2. Redress by the joint act of the Parties.	
Accord and Satisfaction; Arbitration	5
CHAP. II.—Redress by operation of Law.	
Retainer; Remitter	8
CHAP. III.—Redress by suit in Courts.	
Division of the Subject: Courts; Attorneys; Counsel	11

PART I.

CHAP. I.—The Superior Courts of Common Law.	
S. 1. Common Pleas	18
2. Queen's Bench	22
3. Exchequer	24
4. Their Ordinary Jurisdiction	26
5. Their Summary Jurisdiction	27
6. Their Equitable Jurisdiction	29
7. The Judges	38
8. The Masters and Officers of the Courts	39
CHAP. II.—The Appellate Courts.	
S. 1. Exchequer Chamber	41
2. House of Lords	42
CHAP. III.—The Auxillary Tribunals.	
S. 1. Courts of Nisi Prius	43
2. Sheriffs' and Burgh Courts	44

PART II.

CHAP. I.—Injuries cognizable in Courts of Common Law.	
S. 1. Injuries flowing from Courts of Justice.	
Mandamus; Proce ^{do} endo; Prohibition	47
2. Injuries to which the Crown is a Party:	
Remedies where the Crown is the aggressor	50
Remedies where the Subject is the aggressor	51
Quo warrant ^o	51
CHAP. II.—Injuries that affect the Rights of Persons.	
S. 1. Injuries affecting Personal Security	56
Assault, Battery, &c.	57
Nuisances; Slander; Libel; Malicious Prosecution	60
2. Injuries affecting Personal Liberty.	
False Imprisonment; Habeas Corpus	62
3. Injuries to a Husband	64
4. " to a Parent	65
5. " to a Guardian or Ward	66
6. " to a Master or Servant	66
CHAP. III.—Injuries that affect the Right to Real Property.	
S. 1. Ouster of Lands, &c.	67
" Entry	68
" Ejectment, Writ of	70
" Service of Writ	71
" Appearance	74
" Defence	76
" Issue	78
" Trial	80
" Judgment	81
" Execution	82
" Mesne profits	84
" Ejectment, Landlord and Tenant	85
" of Dower	86
2. Trespass quare clausum fregit	87
3. Nuisance	89
4. Waste	92
5. Subtraction	94
6. Disturbance	95
CHAP. IV.—Injuries that affect the Right to Personal Property.	
S. 1. Injuries to Personal Property <i>in Possession</i>	99
Distress	101
What things may be distrained	103
The manner of taking, disposing of, and avoiding Dis-	
tresses	105
The action of Replevin	109
Certiorari	110
Trespass de bonis asportatis	113
Trover	113
Detinue	115
2. Injuries to Personal Property, <i>in Action</i> .	
Debt	116
Covenant	118
Assumpsit	119
The Statute of Frauds	120
Debt on Judgments	121
Qui tam Actions	123
Indebitatus Assumpsit	123
Warranty	128

PART III.

CHAP. I.—The Sittings and Proceedings of the Courts	
S. 1. The Terms	132
2. Motions, Affidavits, and Rules	135
3. Summons and Order	139
4. Service of Rules, Notices, &c.	141
CHAP. II.—Process, Arrest, &c.	
S. 1. Process	143
2. Arrest	145
Bail	148
3. The Forms of Action	151
4. The Statutes of Limitation	153
5. Notice of Action	154
CHAP. III.—The Writ of Summons.	
S. 1. Writ of Summons against Defendants residing within the jurisdiction	157
2. Writ of Summons specially indorsed	162
3. Writ of Summons against British Subjects residing abroad	167
4. Writ of Summons against Foreigners residing abroad	171
5. Amendment of the Writ	173
CHAP. IV.—Service of the Writ.	
S. 1. Service on Defendants residing within the jurisdiction	175
2. Service on Defendants residing abroad	178
3. Irregularity in Service of the Writ	178
4. Indorsement of the Service on the Writ	179
CHAP. V.—Judgment by Default.	
S. 1. Judgment by Default on Non-appearance	182
2. Appearance on Affidavit of Merits	183
3. Judgment by Nil dicit	184
4. Writ of Inquiry to the Sheriff	185
5. Inquiry of Damages before the Master	186
CHAP. VI.—Appearance.	
S. 1. Appearance by the Defendant	188
2. Questions stated without Pleadings	190
CHAP. VII.—The Pleadings.	
S. 1. The object of the Pleadings	193
2. The requisites of Pleadings	197
3. Striking out and amending Pleadings	198
4. The Form of Pleadings	203
5. The Declaration	205
“ Venue in	206
“ Particulars of Demand	212
6. The Plea	213
Plea in Abatement	220
Plea in Bar	226
General Issue	230
Payment into Court	236
7. The Replication	241
8. The Rejoinder	247
9. New Assignment	248
CHAP. VIII.—Demurrer	
	251

CHAP. IX.—Trial.

S. 1. Special Case	256
2. The different modes of Trial.	
" " " by Certificate	257
" " " by the Record	259
" " " by Witness	260
" " " by Jury	260

CHAP. IX.—S. 3. The Issue

4. Notice of Trial	261
5. Countermand of Notice	264
6. Proceedings if the Plaintiff fails to try	265
Trial by Proviso	267
7. Nisi Prius Record	268
8. Proceedings preparatory to the Trial.	
Subpoena	269
Notice to Admit	270
Notice to Produce	272
The Jury	272
Special Jury	273
9. The Trial.	
Withdrawing the Record	276
Plea puis darrein continuance	277
Amendment of the Record	280
Nonsuit	281
Reservation of leave to move	282
Bill of exceptions	282
Withdrawal of a Juror	283
Arbitration	284
Discharge of the Jury	284
10. The Verdict	285
11. Applications to the Judge after the Verdict	287
12. Proceedings after the verdict.	
Arrest of Judgment	290
Judgment non obstante veredicto	292
Repleader and Venire de novo	293
Entry of a Nonsuit or Verdict	294
13. Motion for a new Trial	295

CHAP. X.—Judgment

Costs	300
	304

CHAP. XI.—Proceedings after Judgment.

S. 1. Entry of Satisfaction	305
2. Audita Querela	307
3. Error in Fact	308
4. Error in Law	310

CHAP. XII.—Execution.

S. 1. The requisites of Writs of Execution	319
2. When Execution may issue	320
3. The Revival of Judgments	322
Writ of Revival	326
4. The Abatement of Actions	328
5. Writs of Execution in Ejectment, Replevin, and Detinue	330
6. Capias ad Satisfaciendum	331
7. Fieri Facias	333
8. Levam Facias	337
9. Elegit	338
10. Extent	339

INDEX

INTRODUCTION.

THE object of every proceeding in a court of justice is the recovery of a right or the redress of a wrong; more properly the redress of a wrong, for, as to destroy or impair a right is to commit a wrong, so the remedy, if it be the recovery of the right so destroyed or impaired, or of damages for the injury sustained thereby, is necessarily the redress of the wrong which has been done. No one can resort to a court of law until his right has been infringed or threatened by a wrongful act, in which view the whole subject of the private rights of individuals, and the vindication of them by proceedings in courts, is treated by Sir William Blackstone, the third volume of whose "Commentaries" is devoted to the "Redress of Private Wrongs," as the fourth volume is to that of "Public Wrongs."

For wrongs are of two species, *private wrongs* and *public wrongs*; the former being an infringement or privation of the private or civil rights belonging to individuals; the latter, a breach and violation of public rights and duties, which affect the whole community, and which are distinguished by the harsher appellation of *crimes*. It is to a consideration of the first only of those species of wrongs, and to their redress by civil suit or action in courts of law, that the following treatise is chiefly devoted.

Before, however, entering on a consideration of the nature either of these private injuries themselves, or of the judicial proceedings by means of which proper redress is obtained, it will be desirable to refer in a few words to certain private wrongs, *or injuries, for which the law [*2 allows to the party injured an extrajudicial remedy: so that the redress of private wrongs or injuries may thus be considered of three several kinds:—1. That which is obtained by the *mere act* of the *parties* themselves; 2. That which is effected by the *mere act* and operation of *law*; and 3. That which arises from *proceedings* in a court of justice, and which consists in a conjunction of the other two, the act of the parties, co-operating with the act of the law.

CHAPTER I.

REDRESS BY THE MERE ACT OF THE PARTIES.

THAT redress which is obtained by the mere act of the parties is of two kinds: *First*, that which arises from the act of the injured party only; and *secondly*, that which arises from the joint act of the party injuring and of the party injured.

1. *Redress by the act of the injured party.*

Of this first sort, again, there are six kinds; viz.—1. Self-defence; 2. Recaption; 3. Entry on Lands; 4. Abatement of Nuisances; 5. Distress; 6. Seizing of Heriots.

If a person himself, or his wife, parent, or child, be forcibly attacked in person or property, it is lawful for him to repel force by force. For the law, when external violence is offered to a man himself, or those to whom he bears a near connexion, makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. The remedy which the law may afterwards accord may be by no means adequate for injuries accompanied with force; since it is impossible to say to what lengths outrages of this kind might be carried, were it not permitted to oppose one violence with another. Self-defence, therefore, as it is [*8] justly called the primary law of nature is not, neither can it be in fact, taken away by the law of society, and by the law of England it is held an excuse, not only for breaches of the peace, but for homicide itself, if the resistance does not exceed the bounds of mere defence; for if it did, the defender would himself become an aggressor.

When any one has deprived another of his goods or cattle, or wrongfully detains his wife, child, or servant, the owner of the goods or the cattle, and the husband, parent, or master, may lawfully retake them, wherever he happens to find them; for it may happen that he may have only this opportunity of doing himself justice: his goods or his cattle may be removed or destroyed; and his wife, child, or servant carried out of his reach. If therefore he can gain possession of his property again, without force, the law allows his doing so. But, as the public peace is a superior consideration to any man's private property, this natural right of recaption cannot be exerted where such exertion must endanger the peace of society. Thus, if my horse be taken away, and I find him in a common, a fair, or a public inn, I may lawfully retake him; but I cannot break open a private stable, or enter on the premises of a third person to take him (unless he was feloniously stolen;) but I must either apply to the sheriff to have the horse delivered to me on my giving sureties to prosecute an action of replevin,^(a) or bring an action of detinue, if I wish to recover the horse itself; or trover, if I choose to claim only his value as a compensation for my loss.

(a) *Mellor v. Leather*, 22 L. J. R., 76 M. C.

As recaption is a remedy given to the party who has been deprived of his *personal* property, so an *entry* may be made by the person who has been dispossessed of his lands, by another person having without any right taken possession thereof. This entry must also be peaceable and without force, a forcible entry being severely punishable. This subject will, however, be more properly considered when I come to speak of the remedies which the law gives for the recovery of real property.

*Without enumerating the different kinds of nuisances, it is sufficient here to state, that whatever unlawfully annoys, or damages [*4] another, whether in person or in property, is a nuisance; and such nuisance may be abated or removed, by the party aggrieved, so that he commits no breach of the peace in doing it. If a house or wall be erected so near to mine that it stops my ancient light, which is a *private* nuisance, I may enter my neighbour's land, and peaceably pull it down; but the doing any unnecessary damage must be carefully avoided. If a new gate be erected across the public highway, which is a *public* nuisance, any of the queen's subjects passing that way may destroy it; for the law allows this summary method of doing oneself justice, because injuries of this kind, which obstruct or annoy things of daily convenience and use require an immediate remedy, and cannot wait for the slow progress of the courts.

By far the most important case in which the law allows a person to obtain redress for himself, is that of distraining cattle or goods for non-payment of rent, or distraining another's cattle, *damage faisant*, i. e., trespassing upon his lands. The former remedy is that chiefly resorted to by a landlord, in order to compel the tenant to pay his rent. The latter remedy arises from the necessity of the thing itself, as it might otherwise be impossible, at a future time, to ascertain whose cattle they were that committed the trespass. This subject of distress, however, which is one of the most important in our law, will be more properly considered in reference to the recovery of personal property, and the action of replevin.

The seizing of a heriot when due, on the death of a copyholder, is a remedy given to the lord of the manor, for recovery of the best beast, or other article (as the custom of the manor may be) of which his copyhold tenant died possessed. This custom is a remnant of the ancient tenure of villenage. For heriot-service, which is practically rent, the lord may distrain as well as seize; but for heriot-custom, which Sir Edward Coke says lies only in *prendre* * (taking), and not in *reder* (giving or paying), the lord may seize the identical thing itself, but cannot dis- [*5] train any other chattel for it. (b) So the lord of a franchise may seize waifs, wrecks, estrays, and the like; not that he is debarred of a remedy by action, but because the thing itself may frequently be out of the reach of the law before an action could be brought, as in the case of cattle *damage faisant*.

These are the several remedies which may be had by the act of the injured party only.

(b) The enfranchisement of copyholds, which is now compulsory, will, in the course of a few years, render the law as to heriots, matter chiefly for the antiquary.

2. Redress by the joint act of the parties

The remedies which arise from the joint act of the party injured and of the party who committed the injury are two in number, viz. :—

1. Accord ; and
2. Arbitration.

Accord is an agreement between the party injuring and the party injured ; which, when performed, is a bar to all actions upon account of the injury, the injured party having thereby received satisfaction for, or redress of the injury. Thus if a man contracts to build a house for another, and fails in it, this is an injury, for which the sufferer has his remedy by action for damages ; but if the party injured accepts a sum of money as a satisfaction, this is a redress of that injury, and entirely takes away the action. And if the party injured should resort to an action, the defendant may plead the accord and satisfaction in bar, which plea, to be a good plea, must show the agreement as one not to be performed at a future time, but to have been performed before action brought.(c) Thus where, in an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that a promissory note had been given by the drawer [*6] of the bill to the plaintiff in satisfaction of his demand against the defendant, *a replication by the plaintiff that the note itself had not been paid was held to be no answer. The plaintiff was at liberty to sue on the note, which having accepted for his former debt, he had taken for better or for worse ;(d) but the acceptance in satisfaction, in such a case, must be an act of the will of the party accepting,(e) for a mere acceptance of the note, in the case above referred to, for and on account of the amount due to the plaintiff, would have been no answer unless the note itself had been paid, or indorsed away.(f)

Arbitration is where the parties, injuring and injured, submit all matters in dispute to the judgment of two or more arbitrators, who are to decide the controversy ; and if they do not agree, it is usual to add, that another person be called in as umpire, to whose sole judgment it is then referred : or frequently there is only one arbitrator originally appointed. This decision is called an award. And thereby the question is as fully determined as it could have been by the agreement of the parties or the judgment of a court of justice. Experience having shown the great use of this species of tribunal in settling matters of account, and other mercantile transactions which are difficult of adjustment on a trial at law, the legislature established the use of them by the statute 9 & 10 Will. III., c. 15, the provisions of which have been amended by 3 & 4 Will. IV., c. 42. A reference to arbitration most frequently takes place at the trial of a cause, and almost invariably in causes where there are any questions of account, and the arbitrator in such case is, of course, generally a barrister. In such a case the verdict in the cause is generally to be entered as the arbitrator shall direct. A submission to arbitration made in writing between

(c) Bailey v. Homan, 3 Bing., N. O., 920.

(e) Hardman v. Bellhouse, 9 M. & W., 596.

(f) Belshaw v. Bush, 11 C. B. 191.

(d) Sard v. Rhodes, 1 M. & W., 153.

the parties, and the award following thereon, may, however, without any action being brought, be made a rule of court, the effect of which is, that performance of the award is enforced by attachment of *the party [*7] disobeying, (g) or by execution. (h) The award, however, may be set aside by the court, in the exercise of the summary jurisdiction conferred upon it by the statute before referred to, by a mode of proceeding to be afterwards described; and an award will always be set aside, when the arbitrator has not pursued the submission, or has in any respect, exceeded his authority; (i) or when the award itself is uncertain or ambiguous; (k) or when it is not *final*, as not deciding all the matters referred; (l) or when it is uncertain (m) or inconsistent; (n) or when it is illegal, as that one of the parties to it shall do an illegal act; (o) or when the proceedings in the arbitration itself have been irregular; (p) or when the arbitrator has misconducted himself; (q) or when the award has been procured by undue means; (r) or where the arbitrator has clearly mistaken matter of fact; (s) or where it appears on the face of the award that the arbitrator has mistaken the law; (t) or where the award itself is bad in a part not separable from the residue. (u)

In the case of accord and satisfaction, an accord without satisfaction, is no answer to an action. So in the case of arbitration—a mere submission to arbitration does not constitute a good defence; (v) the courts cannot thus be ousted of their jurisdiction; but an actual award may be pleaded in bar. (w)

*CHAPTER II.

[*8]

REDRESS BY THE MERE OPERATION OF LAW

THE remedies for private wrongs effected by the mere operation of law are only two in number, viz.:

1. Retainer; and

2. Remitter.

1. If a person indebted to another appoints his creditor his executor, or if such creditor obtains letters of administration to his debtor, in either case the law gives the creditor a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors

(g) Reg. v. Hansworth, 3 C. B. 745.

(h) Doe v. Amey, 8 M. & W., 565.

(i) Seccombe v. Babb., 6 M. & W., 129.

(k) Stonehewer v. Farrar, 6 Q. B., 730.

(l) Richardson v. Worseley, 5 Ex. 613; Bhear v. Harradine, 7 Ex. 269; Humphreys v. Pearce, 7 Ex., 696.

(m) Pearson v. Archbold, 11 M. & W. 477.

(n) Ames v. Milward, 8 Taunt. 637.

(o) Turner v. Swainson, 1 M. & W., 572.

(p) In re Hick, 8 Taunt. 694.

(q) Hall v. Hinds, 2 M. & G., 847.

(r) Re Plews, 6 Q. B. 845.

(s) Hutchynson v. Shepperton, 13 Q. B., 955.

(t) Fuller v. Fenwick, 3 C. B., 705; Bradley v. Phips, 6 Ex., 897.

(u) Marshall v. Dresser, 3 Q. B., 878.

(v) Harris v. Reynolds, 7 Q. B., 71; Scott v. Avery, 8 Ex. 487.

(w) Parker v. Smith, 15 Q. B. 297.

whose debts are of equal degree. For a debt due on a bond, or for which judgment has been obtained, must be paid in preference to debts due on simple contract. And this remedy by retainer is allowed because the executor cannot commence an action against himself as representative of the deceased, to recover that which is due to him in his private capacity; but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose; for otherwise, by being made executor, he would be in a worse condition than all the rest of the world besides. Although a rateable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet every scheme for a proportionable distribution of the assets among all the creditors has been hitherto found to be impracticable, and productive of more mischiefs than it would remedy. The creditor who first commences his suit being therefore entitled to a preference in payment, it would follow that, as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt in case the estate of his testator should prove insolvent, unless he were allowed to retain it. The doctrine of *retainer* is therefore the necessary consequence of the right of priority of the creditor who first commences his action. But the executor *shall [*9] not retain his own debt in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done while debts of a higher nature subsisted. In an action brought against him, therefore, by any creditor of the testator, the executor may plead the retainer, or give it in evidence, under a plea that he has fully administered; and even after an action brought against him for a simple contract debt, he may pay a specialty debt, and plead that he had fully administered the estate; and this may be done by an executor *de son tort*,^(a) who cannot retain his own debt. An executor may thus always prefer one creditor to another whose claim is of equal degree, by confessing a judgment to the creditor he wishes to prefer, and pleading the payment to him in bar of the other's claim.^(b) If there be more than one executor, each retains in proportion to his debt.

2. Remitter is where he who has the right to, but is not in possession of, lands, afterwards obtains possession by some subsequent, and of course defective title. In this case he is remitted or sent back, by operation of law, to his ancient and more certain title. The possession gained by the bad title is *ipso facto* annexed to his good one; and his defeasible estate annulled by the instantaneous act of law, without his participation or consent.^(c)

But if the subsequent possession be gained by a man's own act or consent, he shall not be remitted. For the taking such subsequent estate is looked upon as a waiver of his prior right. And the reason why this remedy, which operates by the mere act of law, is allowed, is somewhat similar to that why retainer is permitted; because otherwise he who has

(a) *Oxenham v. Clapp*, 2 B. & Ad., 311.

(b) *Lytleton v. Cross*, 3 B. & C., 317.

(c) *Doe d. Daniel v. Woodroffe*, 10 M. & W., 608.

right would be deprived of all remedy. For as he himself is in possession of the estate, there is no person against whom he can bring an action to establish his *prior right. It follows that there is no remitter to a right, for which the party has no remedy by action: [*10] as if the right to the estate, for instance, be taken away by the expiration of twenty years since the right of entry accrued, in this case there can be no remitter.

These are the extrajudicial remedies permitted by the law, where the parties are so circumstanced as to make it either not desirable or not possible to seek redress in a court of justice. We now come to the third mode of obtaining redress of injuries—that by suit or action in courts.

CHAPTER III.

REDRESS BY SUIT IN COURTS.

IN the redress of injuries by *suit in courts* the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are able to procure redress.

Although, in the several cases of redress by act of the parties already mentioned, the law allows, as we have seen, an extrajudicial remedy, yet that does not exclude the ordinary courts of justice; for, though I may defend myself from external violence, I am still entitled to an action to recover damages for the assault: though I may retake my goods, this power of recaption does not debar me from my action of trover or detinue; so I may either enter on the lands to which I have a right, or demand possession by an action of ejectment: I may either abate a nuisance myself or call upon the law to do it for me: (d) I may distrain for rent or sue my tenant at my own option. If I fail to distrain my neighbour's cattle, damage faisant, I may yet sue my neighbour for the damage which I have sustained by the trespass. If a heriot *be withheld from me by fraud or force, I may recover it, though I [*11] never seized it. With regard to accords and arbitrations, these again necessarily suppose a previous existing right of obtaining redress in some other way, which is given up by such agreement. But as to remedies by the mere operation of law, those are given, as we have seen, because no other remedy *can* be had.

In all other cases it is a general and indisputable rule, that where there is a legal right there is also a legal remedy whenever that right is invaded. And in treating of these remedies by proceedings in the Superior Courts of Common Law,

(d) "The Nuisances Removal and Diseases Prevention Acts, of 1848 and 1849, enable town-councils, guardians of the poor, and other public authorities, to take very summary measures for abating nuisances."

I shall describe—

First. The courts themselves which administer these remedies.

Secondly. The injuries cognizable in, and the redress afforded by, these tribunals. And,

Thirdly. The method in which that redress is obtained.(c)

But before proceeding to the first division of the subject, it may be useful to premise a few words of courts generally, their nature and incidents, and of the attorneys and counsel who represent the suitors therein.

A court, then, is a place wherein justice is judicially administered. And as the whole executive power of the law is vested in the crown, all courts of justice are derived from the power of the crown. For whether created by Act of Parliament or subsisting by prescription, the consent of the crown in the former is expressly, and in the latter impliedly, given.

For the more speedy administration of justice between subject and [*12] subject, there are a great variety of courts, some with limited jurisdiction only, such as the new County Courts; some constituted to inquire only, such as the court held by the sheriff of a county to assess damages in certain undefended actions; others to hear and determine, such as the Superior Courts of law; some to determine in the first instance, others upon appeal and by way of review only, such as the House of Lords, the supreme tribunal of the country. All of these courts will be found enumerated in the third volume of the Commentaries of Sir William Blackstone; but it is the Superior Courts of Common Law and their auxiliary tribunals only that require to be mentioned here, as it is solely to their proceedings that the third part of this treatise is devoted. Here, however, it is necessary to mention one distinction which has reference to all courts whatever, viz., that some of them are courts of record, others not of record. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary, for otherwise there would be no end of disputes. If, therefore, the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no, as shall be pointed out hereafter, in speaking of a trial by the record. A court not of record, such as the court-baron incident to every manor, is a court in which the proceedings are not enrolled or recorded; but as well their existence as the truth of the mat-

(c) It would be more logical, perhaps, to enumerate the injuries which are to be redressed, before describing the tribunals which afford the remedies. But the adoption of such an arrangement of the subject would logically involve the necessity of including, under the first head, those injuries which are remedied in the Ecclesiastical and Equity Courts; and under the second head, a description of the County Courts and other inferior tribunals. It is therefore to be recollected by the reader, that beyond occasional or necessary reference, the present treatise is confined to the consideration of the superior courts of law, and the proceedings therein.

tors therein contained shall, if disputed, be tried and determined by a jury. The former species has authority to fine and imprison for contempt of their authority; (f) the latter do not possess *any such power, [*13] unless it is expressly conferred by Act of Parliament.

In every court there must be at least three constituent parts: the plaintiff, who complains of an injury done; (g) the defendant, who is called upon to make satisfaction for it; and the judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and apply the remedy. In the superior courts, both plaintiff and defendant are usually represented by their attorneys and counsel.

An attorney at law is one who is put in the place, stead, or turn of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit; and this personal attendance could only be dispensed with by letters-patent, enabling him to appear by attorney, until, first, the Statute of Merton, 20 Hen. III., and next, the Statute of West. 2, enacted that attorneys might be made to prosecute or defend any action in the absence of the parties to the suit.

It is laid down by Blackstone, that an idiot cannot appear by attorney, but must do so in person; for he has not the discretion to enable him to appoint a proper substitute; but this is not the law in all cases of idiocy. (h) An infant or a married woman cannot appoint an attorney. They must therefore appear in person, or by their prochein amy, or next friend, which they are allowed to do, on presenting a petition to the court for such leave. The attorneys have long, therefore, formed a recognized body; they are admitted to the execution of their office by the superior courts; and are in all points officers of the respective courts in which they are admitted. They have many privileges on account of their attendance there, so they are, on the other hand, subject to the summary jurisdiction which the judges of every *court must necessarily exercise over their officers. The judges therefore are bound, and endeavour as far as they are able, to enforce the strictest observance of good faith and propriety of conduct on the part of the attorneys, and are always ready to listen to complaints against them, and to afford such redress as is possible in the circumstances. It is only over their conduct as attorneys that the courts exercise this summary jurisdiction; with their conduct in their private affairs they have no right to interfere. (i) [*14]

No man can practise as an attorney in any court, until admitted and sworn an attorney. Formerly he could only practise in the particular court to which he was admitted, but now, attorneys admitted of one of the superior courts may practise in any other, upon signing the roll, and thereby becoming an officer of such court. With the mode, however, in which a person is admitted an attorney, we have at present no concern. (k)

(f) The extent of this power is well illustrated in the cases of *Rex v. Clement*, 4 B. & Ald. 218; *Rex v. Davison*, 4 B. & Ald. 329.

(g) In ejectment, he is called *claimant*, as claiming possession of lands.

(h) *Beverley's Case*, 4 Coke's Rep., 124.

(i) *Exp. Aitken*, 4 B. & A., 47.

(k) 6 & 7 Vict., c. 73, R. G. H. T., 1853.

As all the pleadings and other proceedings in personal actions are interchanged between the respective attorneys of the parties to the suit, and as all notices required to be given by the one party to the other are given by and to the attorney, every attorney is required to register a place of business where such notices and other legal proceedings may be served upon him.^(l)

Barristers, or (as they are generally called) counsel, are such as are called to the bar by one or other of the four inns of court.^(m) In the old books they are styled *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing; at which time they might have been called to the degree of *serjeant or servientes ad legem*; a degree to which by custom the judges of the courts of Westminster are admitted, on being [*15] *advanced to the bench. The serjeants till recently had the exclusive privilege of practising in the Court of Common Pleas, but this invidious privilege is now abolished.⁽ⁿ⁾ From the barristers are selected Her Majesty's counsel learned in the law; the two principal of whom are her attorney and solicitor general. They cannot be employed in any cause against the crown without a license, which is obtained on payment of a small fee. Queen's counsel formerly had a salary in virtue of their office, and as their number could not therefore be indefinitely increased, it was usual for the Lord Chancellor to give patents of precedence, which conferred on the holders the same pre-audience they might have had as Queen's counsel; pre-audience in the courts being the only object now attained by these appointments. These latter received no salaries, and could be retained in causes against the Crown; but as Queen's counsel no longer receive salary, letters-patent of precedence have become unusual. All barristers, serjeants, and Queen's counsel indiscriminately, (who are heard by the courts according to their precedence as Queen's counsel, or their seniority as barristers,) may take upon them the conduct of the cause of the suitors, who can only be heard in the superior courts in person, or by their counsel, no persons but counsel being permitted to address those courts.^(o) To maintain the independence of the bar, a counsel can maintain no action for his fees, which are given, not as a salary or hire, but as a gratuity, which a counsellor cannot demand without doing wrong to his reputation: and to encourage due freedom of speech in the performance of his duty to his client, and at the same time to give a check to the unseemly licentiousness of illiberal and uneducated men (a few of whom will invariably insinuate themselves even into the most honourable professions), a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, [*16] and even *prove absolutely groundless: but if he mention an untruth of his own invention, or even upon such instructions if

(l) R. G. H. T., 1853, 165.

(m) No individual has a right to admission to an Inn of Court (*Rex v. Linc. Inn*, 4 of B. & C., 855).

(n) Case of the Serjeants, 6 Bing. N. C. 232; 9 & 10 Vic., c. 54.

(o) *Collier v. Hicks*, 2 B. & Ad., 668.

it be impertinent to the cause in hand, he is then liable to an action from the party injured.^(p) Counsel guilty of deceit or collusion are punishable, by the statute Westm. 1 (3 Edw. I., c. 28,) with imprisonment for a year and a day, and perpetual silence in the courts; and upon their being guilty of any improper and unprofessional conduct, they may be disbarred by the inns of court, when they of course cease to be barristers.^(q)

Members of the bar and attorneys are alike exempt from serving on juries, or as parish constables or overseers of the poor. They are also privileged from arrest while going to, attending on, and returning from court.

^(p) *Hodgson v. Scarlett*, 1 B. & Ald. 232. The subsequent publication of the statement by a third party may, however, expose such third party to an action *Flint v. Pike*, 4 B. & C. 473.

^(q) *Bex v. Gray's Inn*, 1 Doug. 353; *Reg. v. Lincoln's Inn*, 4 B. & C., 855.

PART I.

CHAPTER I.

OF THE SUPERIOR COURTS OF COMMON LAW.

By the ancient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes; viz., the wittenagemote, or general council, which assembled annually or oftener, as well to do private justice as to consult upon public business. At the Conquest, the ecclesiastical jurisdiction was diverted into another channel, and is to this day exercised by the ecclesiastical courts. The Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as councillors to the crown. He therefore established a court in his own hall, called the *aula regia*, or *aula regis*, which was composed of the great officers of state, such as the lord high constable, and lord mareschal, who chiefly presided in matters of honour and of arms, the lord chancellor, whose peculiar business it was to keep the great seal, and examine all writs, grants, and letters that passed under that authority,^(a) and the lord high treasurer, who was the principal adviser in matters relating to the revenue. These high officers were assisted by persons learned in the laws, called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice in matters of great moment and difficulty. Over all presided the chief justiciar, or *capitalis justiciarius totius Angliæ*, [*18] who was the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the absence of the sovereign. This officer principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government.

1. *Court of Common Pleas.*

This *aula regia* being bound to follow the sovereign in all his pro-

(a) See post, page 21.

gresses and expeditions, the trial of common causes therein was found so burdensome to the subject, that king John, who dreaded the power of the justiciar, readily consented to the article which forms the eleventh chapter of magna charta, "that communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo." This "loco certo" was in Westminster-hall, the place where the aula regis originally sat, and there it has ever since remained. The court being thus rendered stationary, a chief justice and other justices of the "Common Pleas" were appointed, with jurisdiction to hear and determine all pleas of land and injuries merely civil between subject and subject. "Which critical establishment of this principal court of common law" (says Blackstone,) "at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood, and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it."

The aula regia being thus stripped of so much of its jurisdiction, and the power of the chief justiciar being also curbed by many articles in the great charter, the authority of both declined, till Edward the First remodelled the whole frame of our judicial polity, and thence acquired the title of the English Justinian. A court of chivalry was erected, [*19] over which the constable* and mareschal presided. The steward of the household presided over another tribunal, constituted to regulate the king's domestic servants, out of which, in the reign of Charles I., sprung the Palace Court, only recently abolished. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers, a court which is generally called into existence pro hac vice, and the last instance of which occurred in 1841, when Lord Denman presided as Lord High Steward, on the trial of the Earl of Cardigan for murder; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort, from which we have now the appellate jurisdiction of the House of Lords. The administration of common justice between man and man was thus distributed: the Court of Chancery issued all original writs(b)

(b) See post, Part III., Introduction. The Court of Chancery is, strictly speaking, one of the *Superior Courts of Common Law*, and some mention of it is therefore necessary, though it is not intended to include in the present volume any account of its mode of proceeding.

The Lord Chancellor is created by the mere delivery of the great seal into his custody. He thereby becomes at once a privy councillor, and prolocutor of the House of Lords. He appoints all justices of the peace; is visitor, in right of the crown, of all hospitals and colleges of royal foundation; and is patron of all crown livings under the value of twenty marks per annum. He appoints directly all the judges of the County Courts, and has otherwise an extensive patronage, exercised by him individually. As a great judicial officer, he is always by sign-manual appointed guardian of all infants, idiots, and lunatics, and he has the general superintendence of all charitable uses in the kingdom. These two branches of his authority, constitute an important part of the jurisdiction of the Court of Chancery. In the Court of Chancery, however, properly so called, there are two distinct tribunals; the one a Court of Common Law the other a Court of Equity; with the latter we have at present no concern.

The common-law court dates from the subdivision of the aula regis, and its jurisdiction is founded entirely on that portion of the authority of the aula regis

under the great seal to the other *courts; the Common Pleas [*20] determined all causes between private subjects; the Exchequer managed the revenue; and the Court of King's Bench retained all the jurisdiction not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown, which comprehend all crimes and misdemeanors, wherein the crown (on behalf of the public) is the plaintiff; in contradistinction to *common pleas*, which include all civil actions, depending between subject and subject. The former of these, or pleas of the crown,

which was reserved to the Lord Chancellor, viz., the issuing of all original writs. Thus one important branch of the jurisdiction of the Court of Chancery on the common-law side is to hold plea on scire facias to cancel letters-patent made against law or upon untrue suggestions; and to hold plea of petitions, monstrans de droit, traverses of offices, and the like, when the crown has done any act, or been put in possession of any lands or goods, in prejudice of a subjects right.* If any cause, however comes to issue in this court, that is, if any fact be disputed between the parties, the Chancellor cannot try it, having no power to summon a jury; but must send the record into one of the superior Courts of Common Law, where it shall be tried, and judgment given, as in ordinary actions.†

In this ordinary, or legal, court is also kept the officina justitiæ: the shop or mint of justice, out of which all original writs, all commissions of sewers, lunacy, and the like, issue; and which is always open to the subject, who may there at any time demand, ex debito justitiæ, any writ that his occasions may call for. "These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of ancient times, originally kept in a hamper, in hanaperio; and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in parva бага; and thence hath arisen the distinction of the hanaper office and "petty bag office, which both belong to the common law court in Chancery." Thus a writ of prohibition, the object of which I shall have occasion to explain afterwards,‡ must be obtained from the Petty Bag Office, during vacation, when it cannot be procured from the other superior courts of common law.

The extraordinary court, or Court of Equity, is now the court of the greatest judicial consequence in the kingdom. Its jurisdiction and proceedings, however, form no part of our subject. But it must be recollected that by the theory of our law (after the Conquest) the subject when injured (if he selected a superior court as that in which he would seek redress) must have applied to the chancellor for a writ directed to the judges, which, setting out the nature of the plaintiff's grievance, ordered them to apply the remedy.

In these early times, the chief judicial employment of the Chancellor must thus have been in devising new writs, directed to the courts of common law, to give remedy in cases where none had been before administered. And to quicken the diligence of the clerks in the Chancery, who were too much attached to ancient precedents, it is provided by statute Westm. 2, 13 Edward I., cap. 24, that, "whenever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot agree it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." This accounts (says Blackstone) for the very great variety of writs of trespass on the case to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty reason and equity of his very case. These writs will be found enumerated in the Registrum Brevium. But as no personal action has for a long time been commenced by original writ, the learning on that subject is now of no use whatever. It is only desirable to recollect that on this stat. of West. 2 is founded the extensive remedial action called the *action on the case*.

* See post, Part II., Chap. I., sec. 3.

† 11 & 12 Vic. c. 94.

‡ See post, Part II., Chap. I., sec. 2.

[*21] formed the proper jurisdiction *of the Court of King's Bench; the latter of the Court of Common Pleas; which is a court of record, and is called by Sir Edward Coke "the lock and key of the common law;" for herein only could real actions, that is, actions which concern the right of freehold or the realty, be originally brought. This court has exclusive jurisdiction in the real actions which still exist, for all, except three, have been abolished, and a concurrent jurisdiction in all other or personal actions.

It takes cognisance also of all civil causes removed into it, by writ of certiorari,^(c) from the inferior courts; and it is the final Court of Appeal from the decision of the Revising Barristers—but with neither branch of its jurisdiction have we, at present, any concern. The *aula regia*, it will be recollected, reserved an appellate jurisdiction, when the Court of Common Pleas was first established at Westminster; consequently, when the jurisdiction of that tribunal passed to the Court of King's Bench, the

[*22] appeal lay, *and, until of late years, did lie, from the Court of Common Pleas to the King's Bench. The appeal is now, however, to the Court of Exchequer Chamber, from which the appeal is again to the House of Lords.

2. Court of Queen's Bench.

The Court of Queen's Bench, so called because the Sovereign used formerly to sit there in person, is the supreme court of common law in the kingdom. The Chief Justice, who represents the *capitalis justiciarius Angliæ* of the *aula regis*, and the *puisnè* justices are, by their office, the sovereign conservators of the peace and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do, he did not, nor by law can he, determine any cause or motion, but by the mouth of his judges, to whom he has committed his whole judicial authority.^(d)

This court is the remnant of the *aula regia*. It is not, nor can it be, from its nature or constitution, fixed to any certain place, but may follow the person of the sovereign; for which reason all writs issuing out of this court are returnable "*ubicunque fuerimus in Anglia*." It has, for centuries, sat at Westminster; but might remove with the sovereign to York or Exeter, if commanded so to do. Under Edward I., it sat at Roxburgh, during that king's invasion of Scotland.

Its jurisdiction is very extensive. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings by writ of certiorari, to be determined by itself, or, by writ of *prohibition*, prevent their progress below. It superintends all civil cor-

(c) The writ of certiorari is most usually issued to remove replevin suits from the County Court. An opportunity will present itself hereafter to describe this writ in reference to the action of replevin.

(d) Edward I. is said, after the dissolution of the *aula regis*, to have sat in the Court of King's Bench. Edward IV. sat in the Court for three days in the second year of his reign. James I. is also said to have sat in person, but was informed by his judges that he could not deliver an opinion.

porations in the kingdom by writs of *quo warranto* and *mandamus*.^(c) It commands magistrates and others to do what their *duty requires in every case where there is no other specific remedy. It takes [*23] cognizance both of criminal and civil causes; the former in what is called the "crown side," the latter in the "plea side of the court. With the jurisdiction on the crown side we have at present nothing to do. On the plea side, or civil branch, this court has an original jurisdiction and cognizance of all actions for trespass, or other injury alleged or supposed to be committed *vi et armis*; and of actions in which any falsity or fraud is alleged: "all of which savour of a criminal nature, although the action is brought for a civil remedy." No action of a purely civil nature could at *common law* be prosecuted by any subject in this court, for, it will be recollected, this branch of the jurisdiction of the *aula regis* was expressly conferred on the Court of Common Pleas. But the King's Bench might always hold plea of any civil action provided the defendant was an officer of the court; or in the custody of the marshal of the court, for a breach of the peace or any other offence. And thus it came by a fiction to hold plea of all personal actions whatsoever, and has continued to do so ever since, it being surmised, as a matter of form in the action, that the defendant was arrested for an imaginary trespass, which he had never in reality committed. Being thus in the custody of the marshal, the plaintiff was at liberty to proceed against him for any other personal injury, the surmise of being in the marshal's custody being a fiction, which it was not permitted to the defendant to dispute. It has long been unnecessary to make use of this fiction, the mode of commencing an action having been for some time uniform in all the superior courts.

The Court of Queen's Bench is also a court of appeal, into which may be removed, by writ of error, the judgments of all inferior courts of record in England; but the exercise of this jurisdiction forms no part of our subject.

The appeal from the Queen's Bench is to the Court of Exchequer Chamber, from whose judgment, as already mentioned, an appeal lies to the House of Lords.

*3. Court of Exchequer.

[*24]

The Court of Exchequer was first set up as a Court of Record by William the Conqueror, as a part of the *aula regis*. It was reduced to its present shape by Edward I.; and intended, according to its original institution, to order and recover the revenues of the crown. "It is called the Exchequer, *Scaccharium*, from the chequered cloth resembling a chess-board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored "with counters;" and consists of two divisions; the receipt of the exchequer, which manages the royal revenue—and with which we have now no concern—and the judicial part of it, which is called the Court of Exchequer of Pleas.

(c) See post, Part II. Chap. I., ss. 1 & 4.

This court was originally a Court of Equity, which sat in the Exchequer Chamber; and till recently it remained so, as well as a Court of Law. Its primary business is to call the debtors of the crown to account by bill filed by the attorney-general, and to recover any lands, goods, or other profits or benefits, belonging to the crown; (f) so that by their original constitution the jurisdiction of the several Courts of Common Pleas, King's Bench, and Exchequer, was entirely distinct; the Common Pleas being intended to decide all controversies between subject and subject; the King's Bench to correct all crimes that amount to a breach of the peace, the crown being then plaintiff, and the Exchequer to adjust and recover the revenue of the crown wherein the sovereign also is plaintiff. But as, by a fiction, civil actions were brought in the King's Bench, so by another fiction all kinds of personal suits might have been prosecuted in the Court of Exchequer. For as all the officers of this court had, like those of other superior courts, the privilege of suing and being sued only in their own court, so the debtors and farmers of the crown were privileged to sue and *impeal all manner of persons in the same court [*25] that they themselves were called into. They had likewise privilege to sue one another, or any stranger, in the same kind of common-law actions (where the personalty only was concerned) as were prosecuted in the Court of Common Pleas.

This gave rise to the common-law jurisdiction of the Court of Exchequer. The writ upon which all proceedings were grounded was called a *quo minus*: in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of—*quo minus sufficiens existit*—by which he was the less able to pay the king his debt or rent. This surmise, of being debtor to the king, like the other fiction which was had recourse to in the Court of King's Bench, soon became mere matter of form, and the court was thus open to all the nations equally. It has long ceased to be used, the mode of commencing an action, being, as has been already stated, uniform in all the courts.

With the proper Exchequer jurisdiction of this court, then, we have at present no concern. It is only as a Court of Common Law, in administering redress for private wrongs, that we have to do with it. It may be mentioned here, that this court issues writs of prohibition to inferior courts, and removes their proceedings by writ of *certiorari* in the same way as the Courts of Queen's Bench and Common Pleas. All the proceedings in ordinary actions are the same as in the Courts of Queen's Bench and Common Pleas, with one exception, that in writs of execution issued from this Court, it is proper to insert, what is called a "*non-omittas*" clause, the writ from this clause being in the nature of a prerogative writ. The appeal from this Court of Exchequer is to the Court of Exchequer Chamber, and from thence to the House of Lords.

We have thus seen how each of the superior Courts of Common Law

(f) Accordingly any proceedings in which the crown is interested, may be summarily removed from any other courts into the Court of Exchequer, upon the Attorney-General merely giving the Court to be informed that the Crown is interested.

was formed out of the *Aula Regis*, and how the Courts of Queen's Bench and Exchequer obtained jurisdiction in "personal actions."

*4. *Ordinary jurisdiction of the Superior Courts.* [*26]

The Court of Common Pleas retains its original exclusive jurisdiction in real actions. (g) The Court of Queen's Bench retains its original cognizance of crimes and misdemeanors, the exclusive jurisdiction of which it exercises by writ of *mandamus*; (h) and its jurisdiction as a Court of Appeal from the judgments of inferior Courts of Common Law, by writ of error, or writ of false judgment. The Court of Exchequer, again, has exclusive cognizance of all causes relating to the revenue.

Each court, as we shall see afterwards, may prevent the encroachments of inferior tribunals by writ of prohibition. To each may be sent from the Court of Chancery cases for the opinion of the Judges in law, as well as issues to be tried by jury, and each court may also remove causes from inferior courts, to be determined by itself, by writ of *certiorari*. (i)

In the exercise of each and all of these different branches of jurisdiction, each court proceeds according to certain forms, which derive their origin from the earliest times, however modified or varied these forms may by centuries of legislation have become. I shall afterwards have occasion to refer to these ancient modes of proceeding. These different branches of jurisdiction, thus varied, constitute the formal or *de cursu* jurisdiction of the different courts. But they possess another species of jurisdiction which, to distinguish it from the formal or *ordinary* jurisdiction, is generally termed the *summary* jurisdiction of the courts.

This summary jurisdiction may be best treated of under two divisions. In the first may be classed all those powers which have been conferred on the courts by different statutes, to be exercised by them *summarily*, *but which constitute, nevertheless, an essential portion of that general jurisdiction by which justice is therein administered. [*27] The issue of a writ of *habeas corpus*, and the discharge of a person wrongfully detained, for example, is as much a part of the jurisdiction of the superior courts, as is the giving judgment for a plaintiff after a verdict, that he recover the debt sued for. The second division of this summary jurisdiction comprises that direct, or, as it is sometimes termed, equitable authority, which every court exercises over its own proceedings, so that they may be neither irregular in themselves nor injurious or oppressive to the suitors. Each of these branches of jurisdiction, it is necessary to describe: the former as the *SUMMARY*, the latter as the *EQUITABLE* jurisdiction of the superior courts.

(g) It is also, as we have seen, the Court of Appeal from the decisions of the Revising Barristers. (h) See post, Part II., Chapter I., sec. 1.

(i) An appeal also lies to either of the superior Courts of Common Law from the decision of the judge of the county court, in matter of law, or in the reception or rejection of evidence.

5. *Summary jurisdiction of the Courts.*

To one important branch of the summary jurisdiction of the Superior Courts reference has already been made. The courts we have seen will, on various grounds, set aside an award, as they will in some cases remit the matter again to the arbitrator. The proceedings by which this summary jurisdiction is exercised, as well as the mode in which their equitable authority over their own proceedings is used, will be afterwards described.”(k)

In reference to annuities, the grants of which must contain certain requisites, and be accompanied by certain formalities,(l) the courts also exercise an important summary jurisdiction; setting aside judgments when these requisites or formalities have not been complied with: and in actions brought on bail and replevin bonds,(m) the courts “may give such relief as “seems to them agreeable to justice and reason.” Another important branch of summary jurisdiction is that before referred to conferred by the Habeas Corpus *Acts,(n) in virtue of which a person [*28] deprived of his personal liberty, may apply to any court or judge for a writ of habeas corpus, which no judge dare refuse, under a penalty of 500*l*. The jurisdiction in this matter is exercised summarily and finally on the return of the writ.

When the right to personal property is disputed, the courts also exercise a very summary jurisdiction, created by the “Interpleader Act.”(o) This jurisdiction is indeed generally exercised by a single judge at chambers, and chiefly in cases, in which, when the sheriff has seized the goods of a defendant against whom judgment has been given, some relative or connexion of the defendant starts up and claims these goods as his. It will be more properly explained, therefore, in reference to Execution; and under that head will also be more usefully mentioned the summary jurisdiction which the courts exercise over their officer, the sheriff, in compelling him to return writs of execution, and to account for the moneys which he may have recovered under these writs, and, if necessary, in punishing him for extortion,(p) if he retains more than he is entitled to, in the shape of fees.

There is one other important branch of summary jurisdiction exercised by the superior courts in reference to mortgages.(q) In any action of ejectment brought by a mortgagee against a mortgagor, to obtain possession of the mortgaged property, in cases where the mortgagor is willing or has a right to redeem the property, the court must stay the proceedings, and compel the mortgagee to reconvey, on payment of his principal, interest, and costs.

It may also be mentioned here that the Court of Exchequer exercises

(k) See post, Part III., Chapter I.

(l) 17 Geo. III., cap. 26; 53 Geo. III., cap. 141; 3 Geo. IV., cap. 92; 7 Geo. IV., cap. 75. (m) 4 Anne, cap. 16, s. 20; 11 Geo. II., cap. 19, s. 23.

(n) 31 Car. II., cap. 2; 56 Geo. III., cap. 100.

(o) 1 & 2 Will. IV., cap. 58. (p) 7 Will. IV., & 1 Vict., cap. 55.

(q) 7 & 8 Geo. II., cap. 20. Common Law Procedure Act, 1852, ss. 219 & 220.

an exclusive summary jurisdiction in certain matters relating to the revenue. Thus, when the amount of the stamp duties payable on deeds or instruments is questioned by the party *from whom these duties are eligible, he may refer the matter to the Commissioners of [*29] Inland Revenue, from whose decision an appeal lies to the Court of Exchequer.(r) A similar right of appeal to this court is given in certain cases by "The Succession Duties Act, 1853."

So much for the summary jurisdiction of the superior courts.

6. *Equitable jurisdiction of the Courts.*

The second branch of the summary, or (as, for the sake of distinction, it is here termed) the *equitable* jurisdiction of the courts, is that which they exercise over their proceedings in action generally. And this equitable jurisdiction is derived from one of two sources; either from the express provisions of certain statutes, or from that inherent authority which every court possesses over its own proceedings. An instance of the first species of equitable jurisdiction occurs, when a judge sitting at nisi prius amends the record before him, in the exercise of the discretionary power to do so. An instance of the exercise of the inherent authority of every court over its own proceedings occurs, when the judges interfere to prevent a false or fraudulent defence from being pleaded so as to bar a rightful claim.

This equitable jurisdiction, then, is chiefly exercised either—

1. In the *amendment* of the judicial proceedings before the courts, so that all actions may be ultimately determined upon their real merits only; or,

2. In the direct *supervision* of the various steps which take place in suits, so that the rules and practice of the courts, according to which these steps are taken, may not produce either hardship or injustice.

In an early period of our judicial history, when the pleadings of the parties were made ore tenus at the bar of the courts, any mistake committed by either party was corrected at once by the court. When oral pleading was superseded by the present practice of *delivering [*30] written pleadings between the parties, the same indulgence as to amendments continued, and hence the courts will at any time amend mistakes in the pleadings, whilst they continue in paper. But anciently after the proceedings were once entered on record, that is, copied out on parchment, and enrolled and recorded in the office of the court, the judges considered that they had no authority to alter them in any respect, either for the purpose of correcting false Latin (in which language all pleadings were recorded till the reign of George II.) or supplying a word, syllable, or letter accidentally omitted. The consequence was, that after judgment had been given in favour of one party, his adversary frequently discovered some trifling blunder in the record, and, by bringing a writ of error, deprived the successful party of the benefit of the judgment. This strict rule was the result of an ordinance of Edward I., which had

(r) 13 & 14 Vict., cap. 97, s. 15; 16 & 17 Vict., cap. 59.

directed the judges to record the pleas pleaded before them, but had forbidden them "to make their records a warrant for their own misdoings, "or to erase or amend them, or to record anything against their previous enrolments." To this rule there were three exceptions:—1. All errors in records might be amended during the same *term* in which they were made, because, in contemplation of law, the record is in the breast of the judges during the whole term, and not on the roll. 2. In an *essoign*, or excuse by a defendant for not appearing at the proper time (for he had formerly four days' grace allowed him), if a plaintiff's name were mistaken, this mistake might be amended, because it was inconsistent with the writ, and if enrolled in its erroneous form, it would be a record against a previous enrolment, and therefore a breach of the ordinance. 3. For the same reason, a *continuance* (which, while in use, was an entry on the record showing the continuation of a cause from one term to another) might be amended so as to make it correspond to the proceedings previously recorded.

But it is obvious that these exceptions would afford little relief from the strictness of the rule, for *the judges refused to rectify the [*31] most palpable errors, after the expiration of the term to which the record belonged. It is possible that they acted in this way from a reasonable regard to their own safety; for in the 17th year of Edward I. (1289), we find a prosecution of enormous severity instituted against the judges, and fines imposed upon them amounting altogether to 70,000*l.* of our money, for offences connected with the erasure and alteration of records.

This rigid abstinence from all alteration of the record led to a series of enactments, called Statutes of Amendment, and Statutes of Jeofails (from the Norman French, *j'ai faillé*), by the former of which authority was given to amend certain specified errors; by the latter the judges were empowered to proceed to judgment notwithstanding such errors. The first Statute of Amendment (14 Edward III., c. 6, 1340) enacted that no process should be annulled by a clerical mistake in writing one syllable or letter too much or too little, but that it should be amended, without giving any advantage to the party who objected to the mistake. Much discussion immediately arose whether the statute, though it authorized the amendment of a *letter* or *syllable*, extended to the case of the total omission of a *word*.^(s) The judges ultimately admitted the amendment of a *word*.

But this statute proved ineffectual. The judges construed the word

(s) In a case in which this point was raised, some years after the statute had been passed, the judges resolved to incur no risk by deciding it, but formally consulted the legislature upon the meaning of the Act. "I went" (says Chief Justice Thorp, who describes this conference in a case in the Year-Book, 40 Edward III., cap. 34,) "together with Sir Hugh Green, to the Parliament, and there were "twenty-four of the bishops and earls; and we demanded of them who made the "statute, if the record might be amended; and the archbishop or metropolitan "said that it was a nice demand, and a vain question of them, if it might be "amended or not, for he said that it might as well be amended; in this case as if "it were but one letter, for if a letter or a syllable fail in a word, it is no word; "wherefore if all the word fail, it may be amended as well as if it failed but of a "letter or a syllable, for there is no more difference in the one case than in the other."

"process" strictly, and confined "amendments to civil suits, and in them to errors, in the *process* for the defendants' appearance, and for summoning the jury. If, therefore, a mistake was made in drawing up the roll or body of the record, the whole proceedings might still have been annulled by a writ of error. To remove this, and to enlarge the power of the judges in making amendments, the statutes 8 Henry VI., c. 12 and 15 (1430), were passed, by which the judges were authorized, "in any record, process, word, plea, warrant of attorney, writ, pannel, or return, to amend all that which to them seemed to be the misprision of the clerk." [*32]

But these enactments, which were the only statutes of amendment in ancient times (those which followed being statutes of jeofails), though they considerably enlarged the power of the judges in making amendments, proved an insufficient relief to suitors. They extended only to the amendment of the "misprision of the clerks," and, upon this point, nice distinctions were suggested, which multiplied to such an enormous extent, that judgments were continually upset by formal objections, founded on errors which the courts did not consider clerical misprisings.

The next legislative provision was a statute of jeofails, 32 Henry VIII., c. 30, (1540), which enacted that "where the jury have given their verdict for either party in any court of record, and a jeofail or mistake is afterwards discovered, the judgment of the court shall stand according to the verdict without reversal." This was followed by the statute 18 Elizabeth, c. 14, (1572), which declares that "after verdict given in any court of record, judgment shall not be stayed or reversed for false Latin, or other faults in form, in original and judicial writs, counts, &c., or for want of any writ, or by reason of the imperfect return of any sheriff, or for want of any warrant of attorney." The 21st Jac. I., c. 13, (1623), specifies several other formal defects not mentioned in the previous statutes, and declares that no judgment shall be stayed or reversed on account of such defects when discovered after verdict. The next statute of jeofails was the 16 and 17 Car. II., c. 8, (1665), called by Mr. Justice Twisden "the Omnipotent Act," which was intended to remove doubts arising as to the distinction between matters of *form* and matters of *substance*. It also specified a variety of minute technical defects, which, after verdict, were not to afford ground for arresting the judgment of the court. These statutes were calculated to aid imperfections in *form* after the verdict of a jury had passed upon the facts. This limitation enabled a party who made no defence to defeat a just action by taking formal objections to the record, in arrest of judgment, or upon a writ of error, of which he could not have availed himself *after a verdict*; to remedy which the statute 4 Anne, c. 16, extended the operations of the statute of jeofails to all cases of judgment by confession or default. [*33]

It thus appears that since the time of Henry VI., the legislature discontinued the direct mode of allowing the judges to amend formal errors in their records where justice required it, and adopted the course of specifying certain errors and mistakes, which were not to deprive the successful party of his judgment. Whether the caution of the judges in

former times suggested this course it matters not. The authority to amend under certain restrictions seems to have been the more efficient remedy; though, perhaps, the legislature may by and by resort to another course, and leave amendments to be made by the parties chiefly interested in making them; for the statutes of jeofails, it may be remarked, have given but very imperfect relief to suitors; professional ingenuity never having failed to draw subtle distinctions in cases where the words of the statutes were, to a common understanding, distinctly applicable.^(t)

[*34] *In modern times a disposition has been manifested to return to the ancient course of increasing the authority of the judges to make amendments.^(u) An important improvement at the time was introduced by the statute 9 Geo. IV., c. 15, which enabled the courts to amend the record, "upon the appearance of a variance between any matter in writing or in print, produced in evidence, and the recital thereof upon the record."

Further improvements, both in the pleading and practice of the courts, were effected by the 8 & 4 Will. IV., c. 42; but all former powers of amendment are thought to be swallowed up in those lately conferred by "The Common Law Procedure Act," 1852, which not only enables amendments to be made in nearly all matters of merely technical detail, but (§222) requires the judges at all times to make all such amendments as shall be necessary, "so that the real question in issue betwixt the parties shall be tried in the existing suit." It is somewhat curious, too, that this statute will practically create a return to some extent to the ancient system of pleading *ore tenns*; for defective pleadings are not to be objected to by special demurrers, to be argued at immense length and at great expense in the courts, but to be summarily objected to before, and amended by, a judge sitting at chambers.

In the Third Part of this treatise the various errors, which may form the subject of amendment, will be pointed out; and it will be recollected that that amendment is either made in virtue of some of the numerous statutory powers to that effect committed to the courts, or in virtue of that inherent authority which every court exercises over its own proceedings, so that these proceedings may be conducted regularly, that they may conduce to the advancement of justice, and that they may not produce in any case hardship or oppression.

This second branch of the equitable jurisdiction of the courts is necessarily more flexible than the *authority to amend the proceedings [*35] conferred by statute. It suits itself to the ever-varying circumstances presented in different suits, and its *nature* will therefore be best understood, by the mention of a few of the circumstances in which it is

(t) For the substance of this historical account of the powers of making amendments possessed by the superior courts, I am chiefly indebted to the article "Amendment," in the Penny Cyclopædia, a work in which all the legal articles, I may be permitted to remark, are alike remarkable for their accuracy and precision. Indeed the names of the members of the bar who were engaged in their preparation afford a sufficient guarantee for the ability displayed in the articles themselves.

(u) But against this course, it is said that there is already a species of reaction among the members of the legal profession.

exercised. The *mode* in which it is exercised will be afterwards described.(v)

The summary jurisdiction which the court exercised over its own officers has been already referred to with reference to the attorneys.(w). The Sheriff is also an officer of the courts, and so are the Masters. To a complainant of the conduct of any of these persons, the courts are bound to listen, and to give redress if necessary. The first object of this interference by the court is, therefore, to enforce good conduct on the part of those officers who, ministerially only, assist in the administration of justice.

It is equally essential that the proceedings of the suitors, which ought to be in accordance with the rules and practice of the court,(x) should be in all respects regular. Thus, judgment against a defendant for his default in not appearing to a writ,(y) or for want of a plea,(z) or judgment of non pros against a plaintiff (i. e., that he does not prosecute—non prosequi—his suit),(a) may be signed at the end of a certain number of days. If any of these judgments be signed before the proper time has elapsed, it will be set aside as irregular. But the complaint of the irregularity must be made within a reasonable time, and in all cases before another step has been taken in the cause.(b) So, if a plaintiff proceeds to trial without having given the notice to which the defendant is entitled,(c) the verdict of the jury will be set aside, and a new trial granted,(d) unless the defendant shall have appeared at the trial, or otherwise, as in the *former case, have waived his right of objecting to irregularity.(e) [*36] The second object of the summary interference of the courts is, therefore, to prevent irregularities in their own proceedings.

Neither will the courts permit their forms of pleading (which are calculated alone to bring out those questions of law or of fact, which are really disputed between the parties) to be abused, even when the prescribed forms are strictly adhered to. A plea of a release (from the action, for instance) is a very ordinary plea in practice; but if the release itself has been obtained improperly, the court will not allow it to be pleaded. Thus a pauper plaintiff will not be allowed to trick his attorney out of the costs of the action,(f) a husband to act in fraud of a deed of separation,(g) or one of the several plaintiffs fraudulently to release a debt.(h) In short, where the courts perceive that justice requires the interference of a court of equity, and that a court of equity would interfere, in every such case, in order to save the parties the expense of proceeding to a court of equity, they will give the parties the aid of their equitable jurisdiction to enable them to effect the same purpose.(i)

(v) Post, Part III. Introduction.

(w) Ante, Introduction. Cap. III.

(z) R. G. H. T., 1853. R. G. T. T., 1853.

(y) Com. Law Proc. Act, 1852, s. 27. (z) Ibid., s. 63.

(a) 13 Car. II., c. 2.

(b) R. G. H. T., 1853, 135.

(c) Com. Law Proc. Act, s. 97.

(d) Williams v. Williams. 2 Dowl. 350.

(e) Doe and Antrobus v. Jephson. 3 B. & Ad. 402. Young v. Fisher. 2 Dowl. N. S. 637.

(f) Wright v. Burroughs, 3 O. B., 344.

(g) Innell v. Newman, 4 B. & Ald., 419.

(h) Barker v. Richardson, 1 Y. & J., 362.

(i) Phillips v. Clagget, 11 M. & W., 84.

In these cases the fraudulent plea is well pleaded until the special facts being shown, the courts cause it to be struck out. In the same way, where a plea is palpably *false*, the courts either hold the plaintiff justified in signing judgment, as for want of a plea altogether, *(k)* or set it aside. *(l)* So if it be *sham* plea, as of a judgment recovered in a court of piepoudre, no such court having been held for centuries, *(m)* or utterly *frivolous*, *(n)* it will be set aside. When, anciently, the parties pleaded *ore tenus* in open court, no counsel would have dared to plead such pleas. Now that the [*37] *pleadings are in writing, and are interchanged by the attorneys in the cause, a more dilatory, but not less effectual mode of preventing such malpractices, is resorted to. An attorney has been fined for delivering a false plea, and in several instances ordered to pay the costs of setting aside such pleas, which are justly regarded as almost a contempt of the court, which therefore interferes summarily to prevent this abuse of its forms. *(o)*

If the courts do not allow a defendant to set up a fraudulent release, or to plead a false, a sham, or a frivolous plea, neither do they allow a strict adherence to their rules or practice to produce hardship or oppression. Thus, if a defendant inadvertently fails to appear in proper time, so that judgment is signed against him by default, the courts will exercise this equitable jurisdiction in setting aside the judgment, and allowing the defendant to appear and plead. (This particular exercise of their authority is now statutory.) *(p)* But they will only do this on equitable terms; for if the defendant by his delay, or *laches*, has allowed the plaintiff to incur expense in signing judgment, he must pay these costs; and as the judgment itself is perfectly regular, it will not be set aside merely to allow the defendant to gain time, for this would be an abuse of the authority of the court. The defendant, therefore, in such a case, must further swear to a defence "on the merits" of the case, for otherwise, to set aside the judgment, would be wrongfully to delay the plaintiff. So if a defendant requires further time to plead than in practice is allowed him, he may obtain it by a proper application; for it would be unjust to give judgment against him, because he had not had time to make his defence. But here also equitable terms will be imposed; for if a defendant attempts, in this way, to gain time, and throw a plaintiff over the assizes or sittings, at which his cause in due course ought to be tried, the defendant will be tied *down to accept a shorter notice of trial, [*38] than the full period to which he is otherwise entitled by law. To illustrate at all fully the various circumstances in which this equitable authority of the courts is exercised, it would be necessary to enumerate all the steps in an action. It will be better, therefore, that, in the perusal of the Third Part of this treatise, the reader should keep in view, that whenever a suitor can point out that any hardship is likely to arise,

(k) Vere v. Carden, 5 Bing. 413.

(l) Nutt v. Rush, 4 Ex., 490.

(m) Blewitt v. Marsden, 10 East, 237.

(n) Bradbury v. Emans, 5 M. & W., 595.

(o) The summary and statutory remedy given by the Com. Law Procedure Act, 1852, s. 52, when pleadings which are calculated to prejudice, embarrass, or delay are pleaded, will be noticed afterwards.

(p) Com. Law Proc. Act. 1852, s. 27.

from a strict observance of those rules by which the practice of the court is governed, he may apply to the court for relief. At the same time it is to be observed, that there must be no delay or *laches* on his part in making the application; for if he be wilfully late in doing so, or if the granting of relief to him would impose hardship on his opponent, relief will not be granted.

Before closing this enumeration of the circumstances in which the courts interfere summarily or equitably, it ought further to be added, that they will sometimes interfere to protect a person against the effect even of his own acts. Thus if a person, by false or fraudulent representations, induce another to sign a *cognovit* or execute a *warrant of attorney*, the court will relieve him, on proper cause being shown for doing so: and so, if a judgment be signed, or any proceeding, however regular, taken, contrary to good faith, the party injured thereby will be replaced in his former position. If a plaintiff, legally entitled to do so, vexatiously bring several actions for the same cause, the court will compel him to elect which to prosecute, or, at the instance of the several defendants, consolidate the actions themselves. In the Third Part of this volume, opportunities will present themselves for referring to these and other instances of an exercise of the equitable jurisdiction of the superior courts of common law.

7. *The Judges.*

Each of the courts has five judges attached to it, the Courts of Queen's Bench and Common Pleas having each a lord-chief-justice appointed by the queen's writ, and four puisne justices appointed by patent. [*39] The lord-chief and puisne barons of the Exchequer are also appointed by patent. No judge is removable by the crown, but on the address of both Houses of Parliament. A single judge, as we shall see afterwards, in some cases exercises all the powers of the full court.

8. *The Masters of the Courts.*

The masters of each court are its most important officers. Some of their number attend every sitting of the court to which they are attached, of which it is their duty to record all the proceedings. When a judgment of the court is appealed from, or, technically, when error is brought upon a judgment, one of the masters also attends the Court of Error.

At the offices of the court they superintend the issue of all writs, and generally all the formal proceedings in an action. They there receive, and they afterwards account for all the fees charged on legal proceedings. They receive also, and pay out to the suitors, all money paid into court, and they tax the bills of costs of the attorneys.

In certain undefended actions, as we shall afterwards see, the amount sued for must be ascertained by the master, on whom not only an inquiry of this nature, but various other inquiries, often of a most important and difficult kind, are frequently devolved.

Their manifold duties are performed by the masters at the respective offices, their attendance at which is regulated by the courts.^(g)

There are several other officers of the courts, whose several duties need not be here detailed. Such are the commissioners for taking affidavits, which are much used in the course of legal proceedings, the marshals of each court, with whom records are entered for trial, and the keeper of the Queen's Prison, to whose custody prisoners are committed, &c., &c. The attorneys, as I have already pointed out, are also officers of the [*40] court, but the only other officer to *whose duties I need specially refer is the sheriff of each county in England and Wales and of Berwick-upon-Tweed. This officer has the execution of all the processes of the courts. He it is who (by his bailiff) takes the body of a defendant, sells his goods, or seizes his lands after a judgment against him; duties which are performed by the *coroner*, if the sheriff himself is a party to the cause; or by *elisors*, or persons elected or chosen by the court, if the coroner be also interested.^(r) That business may not be delayed, each sheriff is obliged to have a deputy, resident or to be found within a mile of the Inner Temple Hall.

For the performance of the several duties of his office, the sheriff is entitled to charge various fees. At common law he is bound to execute the queen's writs without fee or reward. These fees are therefore given to him by various statutes; but these will be more conveniently mentioned in reference to the concluding stage of an action, the recovery of the amount, awarded by the judgment of the courts, by the different processes of execution.

A more convenient opportunity will present itself in the Third Part of this treatise for describing the origin of the *terms*, during which the courts sit for the despatch of business.

CHAPTER II.

OF THE APPELLATE COURTS.

THE three courts of which in the preceding chapters a short account has been given, constitute what are generally termed the Superior Courts of Common Law.^(s) From the judgment of each, however, there is an [*41] "appeal to another tribunal, and from that to one of paramount authority. These, however, may be described in a very few words. The first is the Court of Exchequer Chamber.

This court has no original jurisdiction, but is only a court of appeal. It was first erected by a statute of Edward III., to determine causes upon

(g) R. G. H. T., 1852. Directions to Masters.

(r) The sheriff has also certain judicial duties, which are generally performed by the under-sheriff.

(s) The Court of Chancery has, however, as already stated, a Common Law side, and may therefore be called a Superior Court of Common Law. As to this, see ante, page 19.

appeal from the common-law side of the Court of Exchequer. It will be recollected that an appeal lay from the Court of Common Pleas to the Court of King's Bench, and an appeal from the Court of King's Bench to the House of Lords, so that there was no necessity for constructing an appellate tribunal for either of these courts, while the Court of Exchequer having been originally an integral part, and not an offshoot from the *aula regis* was, so to speak, a supreme court in itself. The first-erected court of error consisted of the Lord Chancellor and Lord Treasurer, taking unto them the justices of the King's Bench and Common Pleas. In imitation of it, a second Court of Exchequer Chamber was erected by a statute of Queen Elizabeth, consisting of the justices of the Common Pleas and the barons of the Exchequer, before whom error might be brought to reverse judgments in certain suits originally begun in the Court of King's Bench, viz., those of a civil, or contradistinctive to those of a criminal, nature. The Court of Exchequer Chamber has, however, been remodelled by a statute of William IV.; and now it presents three different phases, so to speak, dependent upon which court the appeal is from. For error brought upon any judgment of the Court of Queen's Bench is argued before the judges of the Court of Common Pleas and barons of the Exchequer; an appeal against a judgment of the Court of Common Pleas is to the justices of the Queen's Bench and the barons of the Exchequer; and the appeal from a judgment of the Court of Exchequer, in the same way, to the justices of the two other courts, the justices, or justices and barons, in each case, constituting the Court of Exchequer Chamber.

*From the Court of Exchequer Chamber, an appeal lies to— [*42]

The House of Peers, which is the supreme court of judicature in the kingdom, having no original jurisdiction, but only upon appeal, to rectify any injustice or mistake of the law committed by the courts below. To this authority this tribunal succeeded upon the dissolution of the *aula regia*. "For" (says Sir William Blackstone) "as the barons of Parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside, it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions upon which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them; since upon their decision all property must finally depend."

But though each individual peer is a judge of this, the supreme tribunal of the country, for many years the judgments of the House of Lords have been given exclusively by the Lord Chancellor and such other

peers as have held high judicial office. It may also be mentioned, that of late years, in several "dubious cases," those noble lords have not referred themselves to the opinion of the judges, but have given several judgments in opposition to the views of these learned persons.

[*43]

CHAPTER III.

OF THE AUXILIARY TRIBUNALS.

THERE is another species of courts, of general jurisdiction and use, which act as collateral auxiliaries to the foregoing, and which must not be passed over, viz., the Courts of Nisi Prius, and the Sheriff's and Borough Courts.

1. *Courts of Nisi Prius.*

The courts of Nisi Prius are composed of two or more commissioners, who are twice in every year sent by special commission under the Great Seal all round the kingdom, (a) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster Hall. These judges of assize, as they are generally termed, came in the room of the ancient justices in eyre, who were first appointed by the parliament of Northampton, A. D. 1176, 22 Hen. II., with a delegated power from the aula regia, being looked upon as members thereof. They made their circuit once in seven years, till directed by Magna Charta, c. 12, to be sent into every county once a-year, to take recognitions or assizes; the most difficult of which they were directed to adjourn into the Court of Common Pleas. The present justices of assize and Nisi Prius are more immediately derived from the statute Westm. 2, (b) which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county, and they usually make their circuits in the vacations after Hilary and Trinity terms. (c)

[*44] *They sit by virtue of five several authorities or commissions, none of which need at present be mentioned, except the commission of Nisi Prius, which empowers them to try all questions of fact, issuing out of the courts at Westminster, that are then ripe for trial by jury. These causes, (all the pleadings, and other proceedings in which, though interchanged by the respective attorneys of the plaintiff and defendant, are supposed to take place in open court,) when ripe for trial, are also theoretically to be tried at Westminster, in some Easter or Michaelmas term, by a jury theoretically to be summoned from the

(a) To each of the northern and southern divisions of Wales only one judge is sent, and in London and Middlesex, Courts of Nisi Prius are holden in and after every term, before the chief or other judge of the several superior courts.

(b) 13 Ed. I., c. 30, and see 12 Ed. II., c. 3, and 14 Ed. III., c. 16.

(c) As to the terms, see Part III., Chapter I.

county, wherein the cause of action arose. But in the former writs, called the *venire facias*, by which all the needless formalities were accomplished, there was this proviso, that the jury were to be summoned to Westminster Nisi Prius, *unless, before* the day prefixed, the judges of assize came into the county mentioned. This they were sure to do in the vacations, preceding each Easter and Michaelmas term, and there to try the cause, a proceeding which thus gave the name to the sittings at Nisi Prius.

The judges on circuit have the same power to grant summonses and make orders in causes depending in the courts at Westminster, as the courts themselves. (d) Indeed, the most important of all amendments, those made on the record itself, are necessarily made by the judge sitting at Nisi Prius.

2. Sheriff's and Borough Courts.

The Sheriff's Court is a court held by the sheriff of a county, or by his deputy, either (in virtue of a writ of inquiry) to assess the damages which the plaintiff has sustained in an undefended action, or to try issues sent to him for that purpose, by a writ of trial.

There are numerous actions in which the damages are unascertained, until a jury shall have fixed the amount. In these the plaintiff can only make a general, and often an exaggerated, demand on the defendant; *and in such cases, if the defendant confesses the action by failing [*45] to appear in court when required so to do, the plaintiff is entitled to judgment, to the effect that he recover the damages he has sustained. This is what is called an *interlocutory*, in contradistinction to a *final* judgment. Thus, in an action of damages for breach of promise of marriage, or for libel, or false imprisonment, the plaintiff, if the defendant does not appear or plead, signs interlocutory judgment. So where judgment has been given for the plaintiff on demurrer, or on an issue of nul tiel record, that he do recover his damages, the judgment is interlocutory, for the court cannot award any particular amount as the sum of damages, until that amount has been ascertained. Immediately after this interlocutory judgment, the court, to inform its conscience of the amount for which *final judgment* is to be given, issues a writ of inquiry, which writ may be executed before one of the judges of assize, sitting in the Nisi Prius Court at the assizes, or before the judge who tries the causes at Nisi Prius in London or Middlesex, but is generally directed to and executed by the sheriff of the county where the venue is laid. (e) This inquiry partakes of the nature of an ordinary trial by jury, except in this respect, that all the plaintiff has to prove, or the defendant can controvert, is the *amount* of the damages: the cause of action is admitted. When the inquiry has been executed, the finding of the jury is returned by the presiding judge to the court from which the writ issued. (f)

(d) 1 Geo. IV., c. 55, ss. 5 & 6.

(e) 2 Wm. Saund. 107, n. 2.

(f) The writ of inquiry was formerly resorted to in a great many instances in which it has now ceased to be used. The operation of the County Courts, combined with the power of specially endorsing the writ of summons and signing final

The Borough Courts are courts held in some particular boroughs, before the recorder of the borough, or other judge of the court. These courts have often an unlimited jurisdiction in civil actions, and are regulated by numerous statutes. At present, however, it is only as auxiliary [*46] tribunals to the *superior courts, that they and the courts of the sheriff are mentioned. The jurisdiction of both, in this respect, is conferred by the stat. 3 & 4 Will. IV., c. 42, which provides that in any action depending in the superior courts for any demand not exceeding 20*l.*, the court, or any judge thereof, if satisfied that the trial will not involve any difficult question of fact or law, may direct that the issue shall be tried before the sheriff of the county where the action was brought, or any judge of any court of record in such county. For that purpose a *writ of trial* issues, directed to the sheriff, or to such judge, and commanding him to summon a jury, try the cause, and thereafter return the writ with the verdict endorsed thereon. Upon the receipt of the writ, a jury is summoned, and the plaintiff gives the defendant notice of trial, as in ordinary actions. The whole proceedings at the trial are the same as those in causes tried before judges of the superior courts, and which will be described in the Third Part of this treatise. The jury having given their verdict, and that verdict being endorsed on the writ, the writ is then returned to the superior court executed.

Upon the return of a writ of inquiry or writ of trial, costs can be taxed, *final* judgment signed, and execution issued forthwith. The sheriff, however, before whom a writ of inquiry is executed, or the sheriff or judge before whom a writ of trial is had, may certify that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court for a new inquiry or a new trial. So a judge of any of the superior courts may order that judgment or execution shall be stayed till a day named; and, in this way, time is secured for an application to the court to set aside the verdict, and grant a new trial, if any wrong or irregularity has been committed in the course of the previous proceedings.

Such are the courts in which the redress of private injuries is sought and obtained. I now proceed to an enumeration of the wrongs themselves which may be therein redressed, and of the remedies which the law gives to the party injured.

judgment in default of appearance, given by the Common Law Procedure Act, 1852, will supersede these writs altogether.

PART II.

*CHAPTER I.

[*47]

OF THE INJURIES COGNIZABLE IN THE SUPERIOR COURTS OF COMMON LAW.

IT is a principle of the law of England, that every right, when withheld, must have a remedy, and every injury its proper redress. It is to the definition of the numerous injuries committed in the mutual intercourse between subject and subject, and their respective legal remedies, that our attention is now to be directed. There are two species of injuries, however, which it may be useful to mention here, as neither can strictly be said to be committed in the mutual intercourse between subject and subject. The first species comprises such as may be considered to flow from courts of justice; the second, again, those injuries in which the sovereign may be the aggressor or the sufferer, and which are not remedied in the same way as injuries committed by one subject on another. An injury or wrong of the former species, then, occurs either when justice is delayed by an inferior court that has proper cognizance of the cause, or when such inferior court takes upon itself to examine a cause and decide the merits, without legal authority to do so.

1. *Injuries flowing from Courts of Justice.*

The first of these injuries, the refusal or delay of justice, is remedied by a writ of mandamus, which is a command issuing in the name of the sovereign from the Court of Queen's Bench, and directed to any person, corporation, or inferior court of judicature, *requiring them to do some *particular* thing therein specified, which appertains to their office and duty. It may be issued in some cases where the injured party has another redress by action, as in the case of restitution to an office; but it issues in all cases where a party has a right to have anything done, and has no other specific means of compelling its performance. It was originally confined in its operation to a very limited class of cases affecting the administration of public affairs, such as the election of corporate officers, the restoration of officers improperly removed, the compelling inferior courts to proceed in matters within their jurisdiction, or public officers to perform duties imposed upon them by common law or by statute, as to make a rate, and the like. In modern times this remedy has been extended to cases in which the rights of private individuals only were concerned. In the present day no session of Parliament occurs, in which a great number of acts do not pass for making railways, forming docks, improving towns, and an infinite variety of public works, to be done generally by joint-stock corporations or companies for the benefit of the shareholders. In almost every act of this kind there are

provisions directing the company to do certain works, such as making communications between lands intersected by railways or canals, substituting new buildings for others which have been necessarily removed, making roads in lieu of old ones blocked up or injured, and a variety of other works of a similar character. In the event of noncompliance with these enactments, a writ of mandamus must be resorted to. And should the recommendations of the commissioners recently appointed to examine and report on the administration of justice in the courts of common law (Second Report, 1853,) be adopted by the legislature, the operation of this writ will be extended to nearly all the cases, in which at present the law only gives redress, by the award of damages for an injury after it has been committed, for at present the common law courts are powerless in the prevention of injuries. *All [49] the remedy which they can give to the injured party is such damages as the jury may award, or the defendant may admit the plaintiff to have sustained. At present I have only however to remark, that the writ of mandamus issues to the judges of any inferior court, commanding them to do justice, whenever the same is delayed; for it is the peculiar business of the Court of Queen's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or the legislature has invested them.

The delay or refusal of justice may also be remedied by a writ of procedendo, which issues out of the common law side of the Court of Chancery, and commands the inferior court to proceed to judgment (procedendo ad judicium); which judgment, if erroneous, can be remedied by writ of error, if it be a court of record, or writ of false judgment, if a court not of record, to the Queen's Bench.

The other injury, which is that of encroachment of jurisdiction, or calling one to answer in a court, that he has no legal cognizance of the cause, is also a grievance, for which the remedy is by the writ of *prohibition*.

A prohibition issues properly only out of the Court of Queen's Bench, being a prerogative writ; but, for the furtherance of justice, it may now be had out of the Courts of Common Pleas and Exchequer. From these courts, however, this writ can be obtained only during term. During vacation, application must be made to the common-law side of the Court of Chancery. This writ is directed to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. And if either the judge or the party to the suit shall proceed after such prohibition, an attachment may be had [50] against *them, to punish them for the contempt, at the discretion of the court that awarded it; and an action would lie against the offender to repair the party injured in damages.

It would be out of place to detail the various proceedings in court, which follow the issue of a writ of mandamus, procedendo, or prohibition. It is not within the scope of the present treatise to do so; and I therefore confine myself to pointing out very generally the injuries which these different writs are calculated to remedy.

2. *Injuries to which the Crown is a Party.*

The private wrongs or injuries to which the crown may be a party, are either,—*first*, those which a subject may suffer from the crown; or, *secondly*, those which a crown may receive from a subject.

That the king can do no wrong is a fundamental principle of the British constitution; meaning only, however, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally to the sovereign; but his ministers, and not he, are accountable for it to the people: and, secondly, that the prerogative extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudices. Whenever therefore, by misinformation or inadvertence, the crown has invaded the private rights of a subject, though no action will lie against the sovereign,^(a) yet the law has furnished the subject with a respectful mode of removing that invasion, by informing the crown of the true state of the matter in dispute.

The distance between the sovereign and the subject is such, that it rarely happens that any *personal* injury can proceed directly from the prince to a private man. Injuries, again, to rights of *property* can scarcely be committed by the crown without the intervention of its officers; for whom the law entertains no delicacy, but furnishes various methods *of detecting the misconduct of those agents by whom the sove- [*51] reign has been induced to do a temporary injustice.

The common-law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By petition de droit, or petition of right, which is said to owe its origin to King Edward the First. 2. By *monstrans de droit*, manifestation or plea of right.

The technical distinctions between, or an explanation of the procedure in either a petition of right or a *monstrans de droit*, form no part of the subject of this treatise.^(b)

There are several methods of redressing those injuries, which the crown may receive from a subject.

As the sovereign, by reason of his legal ubiquity, cannot be dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession, such as an ejectment; but he may bring a *quare impedit*, which always supposes the complainant to be possessed of the advowson. So the sovereign may bring an action of trespass for taking away his goods, or for breaking his close, or other injury done to his possession; but such actions, though in strictness maintainable, are unknown in practice, as more effectual remedies are obtained by such prerogative proceedings as are confined to the crown.

An *inquisition* or *inquest of office* is an inquiry made by the sheriff, coroner, or commissioners specially appointed, concerning any matter that entitles the crown to the possession of lands or goods. This is done by

(a) Doe d. Legh v. Roe, 8 M. & W., 579.

(b) The reader may consult the cases of Smith v. Upton, 6 M. & G. 252. The Baron de Bode's case, 8 Q. B., 208.

a jury of no determinate number, and was chiefly used during the continuance of military tenures: when, upon the death of a tenant in capite, an inquisitio post mortem was held, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the crown to his relief, primer-seisin, or other feudal advantages.

[*52] *Inquests of office still remain in force, for every jury which tries a man for felony, every coroner's inquest that sits upon a *felo de se*, is in all respects an inquest of office; and if they find the felony, the crown is thereupon, by virtue of this *office found*, entitled to the forfeitures.(c)

Where the crown has unadvisedly granted anything by letters-patent, which ought not to have been granted, or where the patentee has done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by a writ of *scire facias*, issued from the common-law side of the Court of Chancery. This may be brought either on the part of the crown, to resume the thing granted; or, if the grant be injurious to a subject, the sovereign is bound of right, to permit him to use the royal name, for repealing the patent in a *scire facias*. The record in a *Scire Facias* is sent from the Court of Chancery to one of the courts of common law for trial, and is tried precisely as an ordinary action.

An *information* on behalf of the crown, filed in the Exchequer by the Attorney-General, is a proceeding for recovering money or other chattels, or for obtaining satisfaction in damages for a personal wrong committed on the possessions of the crown. It differs from an information filed in the Court of Queen's Bench; in that *this* is instituted to redress a private wrong, by which the property of the crown is affected; *that* is calculated to punish a public wrong, or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the Attorney-General, who "gives the court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt: intrusion*, for any trespass committed on the lands of the crown, as by [*53] *entering thereon without title,(d) or committing a trespass therein, and detaining the goods and chattels of the crown;(e) and *debt*, as for any forfeiture due to the crown upon the breach of a penal statute. This latter is used to recover forfeitures occasioned by transgressing the revenue laws.

A writ of *quo warranto* is a writ against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he does so. It lies in case of non-user or long neglect of a franchise, or mis-user or abuse of it; commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse, and is prosecuted and determined before the queen's

(c) See an instance of the recovery of a *deodand* by the Crown on a coroner's inquisition, *Reg. v. Eastern Counties Railway Company*, 10 M. & W., 58. *Deodands* are now abolished, however.

(d) *Att.-Gen. v. Donaldson*, 10 M. & W., 117. *Att.-Gen. v. Brown*, 14 M. & W. 300.

(e) *Att.-Gen. v. Hill*, 2 M. & W. 160.

justices at Westminster. In case of judgment for the defendant, he has his franchise allowed; but in case of judgment for the crown, the franchise is either seised to be granted out again; or, if not such a franchise as may subsist in the hands of the crown, there is judgment of ouster, to turn out the party who usurped it.

The proceedings in quo warranto have given way, however, to a simpler procedure to effect the same purpose, viz., by *information* in the Court of Queen's Bench, by the Attorney-General, in the nature of a writ of quo warranto.^(f) This is strictly a criminal prosecution, as well to punish the usurper for the usurpation of the franchise, as to oust him, or seise it for the crown; but it has long been applied merely to try the civil right, seise the franchise, or oust the wrongful possessor, and is chiefly resorted to at present for the decision of corporation disputes, by virtue of the stat. 9 Ann. c. 20, which permits an information to be brought, at the relation of any person desiring to prosecute the same, against any person unlawfully holding any franchise or office in any city, borough, or town corporate.

*The writ of mandamus is also (by 9 Ann. c. 20) a remedy for [*54] refusal of admission, where a person is entitled to any office or place in a corporation; or for wrongful removal, when a person is legally possessed of such office or place. These are injuries for which this prerogative writ issues, because the franchise concerns the public; the party injured may nevertheless have his action, though in such cases it is difficult to prove any damage to have been sustained.

CHAPTER II.

OF INJURIES THAT AFFECT THE RIGHTS OF PERSONS.

WE now come to consider the remedies which may be had in the superior courts of Common Law, for injuries or private wrongs generally: in treating of which, we are to be confined to such wrongs as may be committed in the mutual intercourse between subject and subject.

Now, since all wrong may be considered as a privation of right, the natural remedy for every species of wrong, is the being put in possession of that right, whereof the party injured is deprived. This may be effected, either by a specific restoration of the subject-matter in dispute to the legal owner, as when the possession of lands or goods is unjustly withheld; or, where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages, to which damages the party injured has acquired an incomplete right the instant he receives the injury. The means whereby this remedy is obtained are a diversity of actions, which are defined by the "Mirror" to be "the lawful demand of one's right;" or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetetur*.

(f) Reg. v. Parry, 6 A. & E., 810.

[*55] These several suits, or remedial instruments of *justice, are, from the subject of them, distinguished into three kinds : actions *real, personal, and mixed*.

Real actions, so called because they concerned real property only, were actions whereby the plaintiff, here called the demandant, claimed title to lands, rents, or other hereditaments. By these all disputes concerning real estates were formerly decided ; but they had long been unknown in practice before they were, with three exceptions, abolished. These three exceptions are *dower, right of dower, and quare impedit*. The possession of real property is now recovered by the action of ejectment.

Personal actions are those by which one claims a debt or the performance of a duty, or damages in lieu thereof ; and likewise those whereby one claims satisfaction in damages for some injury done to his person or property. The former are founded on contracts, or arise *ex contractu* or *quasi ex contractu* ; the latter upon torts or wrongs, or arise *ex delicto* or *quasi ex delicto*. Of the former nature are all actions of debt or on promises ; of the latter all actions for trespasses, assaults, libel, and the like.

Mixed actions partook of the nature of the other two, for therein real property was demanded, and also personal damages for a wrong sustained. An action of waste, for instance, was brought by him who had the remainder or reversion, against the tenant for life, to recover not only the land wasted, which would have made merely a *real* action ; but also treble damages, in pursuance of the statute of Gloucester, which was a *personal* recompense. But all mixed actions have been also abolished ; one of the forms of the modern action of ejectment may, however, be considered a mixed action.(a)

Under these three heads may every species of remedy by action be comprised ; and although any detailed account of the real actions still existing would be beyond the scope and intention of this treatise, as indeed would any lengthened consideration of some other legal proceedings, such [*56] as *mandamus* or *prohibition* which have been already *referred to, still the application of these different remedies must be pointed out, merely to avoid an incompleteness which might be found embarrassing.

To return then to the consideration of actions generally, it is clear that in order to apply the remedy which may be thereby obtained, it is necessary to ascertain the complaint, which involves an inquiry into the several kinds of injuries, which may be committed against a man, in his person, or his property. Private wrongs may thus be divided into such as affect the *rights of persons*, and such as affect the *rights of property*.

The rights of persons may be distributed into *absolute* and *relative* : *absolute*, which are such as appertain to men, considered as individuals ; and *relative*, which are incident to them as members of society, and connected to each other by various ties and relations.

The absolute rights of each individual are defined to be (1) the right of personal security ; (2) the right of personal liberty. The right of

(a) See post, Chapter III., s. 1.

private property is one of the *absolute* rights of individuals; but the injuries affecting this right will be best considered, in treating of those wrongs which affect the right of property itself.

1. *Injuries affecting Personal Security.*

Injuries which affect the personal security of individuals, are either to—1, their lives; 2, their persons; 3, their health; or 4, their reputations; and are either *direct* or *consequential*.

Injuries affecting life could not until lately be complained of in a civil court as an injury. (b) But the law is now altered by the stat. 9 and 10 Vict., c. 93, which enacts that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would (had death not ensued) have entitled the party injured, to maintain an action for damages, the person who would have been liable to such action, may [*57] be sued by the executor or *administrator, for the benefit of the [wife, husband, parent, and child, of the person deceased; and the jury may give damages proportionable to the injury resulting from such death, to be divided among the parties respectively, for whose benefit the action is brought, in such shares as the jury shall by their verdict direct. Several actions have been recently brought under this statute. (c)]

Injuries, affecting the persons of individuals, may be committed: 1. By *threats* and menaces of bodily hurt, through fear of which a man's business is interrupted; the most summary remedy for which is an application to a magistrate, to have the offender bound over in recognizances, to keep the peace towards the complainant. 2. By *assault*, which is an attempt or offer to beat another, being within reach of him, although without touching him; as if one merely holds out a stick in a threatening manner at another. (d) So cropping a pauper's hair against his will is an assault. (e) 3. By *battery*, which is the *unlawful* beating of another. The least touching of another's person wilfully, or in anger, is a battery, as throwing water on him; (f) for the law cannot draw the line between degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. The remedy is by action of trespass, for the recovery of damages for the injury. It is essential to constitute a good cause of action that the beating be *unlawful*; for battery is, in some cases, justifiable, as where one gives moderate correction to a child, scholar, or apprentice. So if one assaults me, I may strike in my own defence; and, if sued for it, I may plead son assault demesne, or that "the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence." (g) There are two other species of injuries affecting the *persons of individuals known to the law, viz., *wounding* and *mayhem*, (h) which are [*58]

(b) *Baker v. Bolton*, 1 Camp., N. P., 493.

(c) *Blake v. Midland Railway Company*, 21 L. J. R., 233 Q. B.

(d) *Genner v. Sparks*, 1 Salk. 79.

(f) *Pursell v. Horn*, 8 Ad. & El., 602.

(g) Com. Law Proc. Ac, 1852, Schedule B, 45.

(h) See Blackstone, vol. iii.

practically merely aggravated batteries. The same action of trespass lies to recover damages for either injury, which (when wilful) no motive can justify but self-preservation. Consequently an indictment may be brought as well as an action.

These injuries are *direct*. Those, which are *consequential* only, are generally such as arise by the neglect or default of others in the performance of duties. Thus, if a passenger is injured by the want of care of the driver of a coach,⁽ⁱ⁾ or the plaintiff sustains an injury owing to the negligence of a carman,^(k) the owner of the coach in the first case, the carman's master in the second, will be liable. If in either case the driver or the carman, however, did the injury *wilfully*, even if in the master's service, he, and not the owner or the master would be liable.^(l) Consequential injuries may be done to another by a bull, ram,^(m) monkey,⁽ⁿ⁾ or other animal, and the owner will in such case be liable to the party injured. The owner must know of the mischievous propensities of the animal;^(o) and if the party injured have imprudently exposed himself, he cannot maintain an action;^(p) though he may in some cases, even when he has been a trespasser, as where the defendant had set a spring-gun in his garden, and given no notice of its being there.^(q)

The wrongs or injuries which are thus sustained *indirectly* or *consequentially*, like that which has just been mentioned, when the death of a relative is caused by the wrongful act, neglect, or default of another, are [*59] injuries unaccompanied by force, for *which there is a remedy in damages by an action *on the case*. And this is, perhaps, the best opportunity that I have of observing, that this action of *trespass on the case* is an universal remedy, given for all personal wrongs and injuries, which are committed without force; and it is so called because when actions were commenced by original writs sued out of Chancery, as they continued to be, from the sub-division of the *aula regis* till the early part of the present century, the plaintiff's whole case or cause of complaint was set forth at length in the writ —“ For though in general there were “ methods prescribed and forms of actions previously settled, for redressing those wrongs which most usually occur, and in which the very act “ itself is immediately prejudicial or injurious to the plaintiff's person or “ property, as battery, non-payment of debts, detaining one's goods, or the “ like; yet where any special consequential damage arose, which could “ not be foreseen and provided for in the ordinary course of justice, the “ party injured was allowed, both by common law and the statute of “ Westm. 2, c. 24, to bring a special action on his own case, by a writ “ formed according to the peculiar circumstances of his own particular “ grievance.^(r) For wherever the common law gives a right or prohibits “ an injury, it also gives a remedy by action; and therefore, wherever a

(i) Brotherton v. Wood, 2 Brod. & Bing., 54.

(k) Lynch v. Nurdin, 1 Q. B., 29.

(l) Gordon v. Rolt, 4 Ex., 365.

(m) Jackson v. Smithson, 15 M. & W., 563.

(n) May v. Burdett, 9 Q. B. 101.

(o) Card v. Case, 5 C. B. 622. Hodgson v. Roberts, 6 Ex. 697. The law of Scotland differs entirely from the law of England in this respect, holding such knowledge unnecessary. Orr v. Fleming, Weekly Reporter, 1852-3; 339.

(p) Brock v. Copeland, 1 Esp., 203.

(q) Bird v. Holbrook, 4 Bing. 628.

(r) Part I., chap. I., ante p. 21, note.

"new injury is done, a new method of remedy must be pursued. And "it is a settled distinction, that where an act is done which is in "itself an *immediate* injury to another's person or property, there the "remedy is usually by an action of *trespass*: but where there is no act "done, but only a culpable omission, or where the act is not immediately "injurious, but only by *consequence* and collaterally, there no action of "trespass will lie, but an action *on the case*, for the damages consequent "on such omission or act."^(s)

*Injuries affecting *health* occur where, by any unwholesome [*60] practices of another, a man sustains damage in his vigour or constitution. As by selling to him bad provisions, by the exercise of a noisome trade which infects the air in his neighbourhood, or by the neglect or want of skill of a physician or surgeon. For "*mala praxis* is a great "misdemeanour and offence at common law, whether it be for curiosity "and experiment, or by neglect, because it breaks the trust which the "party had placed in his physician, and leads to the patient's destruction."

Injuries affecting a man's *reputation* or good name are—1, by slander; 2, by libel; and 3, by malicious prosecution.

If a man maliciously utter any false tale of another, which may endanger him in law, by accusing him of some crime,^(t) or may exclude him from society, as to charge him with having an infectious disease,^(u) or may impair his trade,^(v) as to call a tradesman a bankrupt,^(w) or a lawyer dishonest,^(x) this is a *slander*, for which an action on the case will lie, without proving that any damage has happened, but merely on the probability that it might happen. With regard to words that do not import such probability, the plaintiff must aver some particular damage to have happened, which is called laying his action with a *per quod*. Thus, saying of an agent, that he is an unprincipled man, is not actionable, unless there be special damage; but if said to a person about to deal with him, and who does not do so in consequence, this is *special* damage; (although it can be shown that if the person had dealt with him, the dealing would have turned out unprofitable),^(y) and must be averred and proved. Mere opprobrious words, again, will not support an action. Thus, to call a man a "*swindler*,"^(z) or an *adulterer*,^(a) or a woman a "*prostitute*,"^(b) are not actionable *per se*, unless damage ensues, which [*61] may be a foundation for a *per quod*: as if the woman, when accused, be dismissed by her mistress,^(c) though the mistress did not believe the slander. Words of passion, as to call a man rogue or rascal, are not actionable; so neither are words spoken in a friendly manner, as by way of advice, or admonition, without ill will: for they are not *maliciously* spoken, which is part of the definition of slander. Within this category fall

(s) The distinction between *trespass* and *case* is well stated in *Sharrod v. London and North Western Railway Company*, 4 Ex. 580.

(t) *Rowcliffe v. Edmonds*, 7 M. & W., 12.

(u) *Bloodworth v. Gray*, 7 M. & G., 334.

(v) *Jones v. Littler*, 7 M. & W., 423.

(w) *Brown v. Smith*, 21 L. J. R., 151 C. B.

(x) *Boydell v. Jones*, 4 M. & W. 446.

(y) *Storey v. Challands*, 8 C. & P., 234.

(z) *Savile v. Jardine*, 2 H. Blaq. 531.

(a) *Ayre v. Craven*, 2 Ad. & El. 2.

(b) *Wilby v. Elston*, 8 C. B. 142.

(c) *Knight v. Gibbs*, 1 Ad. & El., 43.

communications as to the character of servants, advice as to dealing with tradesmen, and other statements of a like nature, which constitute what are called privileged communications.(d) If the defendant be able to prove the words to be true, it is no slander; for though there be damage, yet, if the fact be true, it is *damnum absque injuria*; and where there is no injury, the law gives no remedy.

A second way of affecting a man's reputation is by publishing a libel upon him, which may be by writing, printing, pictures, or the like; as by publishing of an attorney *ironically* that he was "an honest lawyer,"(e) or in a similar way attempting to render a man ludicrous.(f) For a libel there are two remedies: the one by indictment or criminal information for the public offence, the other for the private injury, by action on the case, for damages. The defendant may, as for slander, justify by pleading the truth of the facts,(g) and show that the plaintiff has received no injury at all; or the publisher of a newspaper may show that the alleged libel was a fair report of judicial proceedings.(h) There [*62] is one distinction between libels and words which is to be attended to. A libel is punishable when merely speaking the words would not be so. Thus, for *speaking* the words "rogue and rascal" of any one, an action will not lie; but if those words *were written and published* of any one, an action would lie.(i)

A third way of injuring reputation is by preferring a malicious indictment or prosecution, which, under the mask of public spirit, may be made the engine of private enmity. For this the law has given a remedy by action on the case for damages; to support which there must have been both malice in the defendant, and a want of reasonable and probable cause. The judge is to decide whether in law the facts found by the jury establish a probable cause, or the want of it; but very slight grounds will be sufficient to do so.(k)

2.—Injuries to Personal Liberty.

A violation of the right of personal liberty is committed by the false imprisonment of the individual; an offence for which the law has not only decreed a punishment, but also gives a private reparation to the party, as well by putting an end to the confinement for the present, as, after it is over, by subjecting the wrong-doer to a civil action, on account of the damage sustained by the sufferer in the loss of his time and liberty.

To constitute a false imprisonment there must not only be detention of the person, but such detention must be unlawful. Every confinement of the person is an imprisonment, whether it be in a common prison, in a private house, or even by forcibly detaining one in the public streets.

(d) *Sommerville v. Hawkins*, 10 C. B., 583.

(e) *Boydell v. Jones*, 4 M. & W., 446.

(f) *Cook v. Ward*, 6 Bingham, 409.

(g) Which he may also do to an indictment for libel. 6 & 7 Vict. c. 96, s. 6. *Reg. v. Newman*, 1 El. & Bl., 558.

(h) *Hoare v. Silverlock*, 9 C. B., 20.

(i) See *Thornley v. Kerry*, 4 Taunt. 355. *Digby v. Thomson*, 4 B. & Ad., 821.

(k) *Musgrove v. Newell*, 1 M. & W., 587. *Turner v. Ambler*, 10 Q. B. 252. *Mitchell v. Williams*, 11 M. & W., 205.

False imprisonment consists in such confinement or detention without sufficient authority; (*l*) or it may arise by exercising a sufficient authority at an unlawful time, "as by executing process, or taking the person in execution on a Sunday, for such execution is void."^(m) [**63*] The remedy is of two kinds; the one *removing* the injury: the other, *making satisfaction* for it.

The means of *removing* the injury of false imprisonment is by writ of habeas corpus (*n*) *ad subjiciendum*; which is directed to any person detaining another, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf; which if he fail to do, an attachment will be awarded against him, and he himself imprisoned. This is a high prerogative writ, and therefore at common law issuing only out of the Court of Queen's Bench, but now out of any of the superior courts of common law, (*o*) by a fiat from any of the judges, and also out of the Court of Chancery.

It would be out of place here to attempt anything like a historical account of this famous writ, and it is no part of our subject to explain in what cases it *issues*, or how it is to be met. The reader will [**64*] recollect how the oppression of an obscure individual gave birth to the Habeas Corpus Act, (*p*) which is frequently considered another Magna Charta of English liberties; and it may, therefore, be enough to add, that on the return of the writ, the judge who has issued it, or the court, make such order summarily as may be thought fit, either setting the prisoner at large or remanding him to confinement.

The remedy by way of *satisfaction* for false imprisonment is by an action of trespass, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery, (*q*) or by an action on the case for a malicious arrest. (*r*)

(*l*) *Kinning v. Buchanan*, 8 C. B., 271.

(*m*) 29 Car. II., c. 7. There are certain exceptions, however. See Chitty's Statutes by Beavan, SUNDAY.

(*n*) Of the writ of habeas corpus there are various kinds used by the courts at Westminster. There is, 1, the habeas corpus *ad respondendum*, which issues when one has a cause of action against a person confined by the process of some inferior court, in order to remove the prisoner, and charge him with this new action in the court above. There is, 2, the habeas corpus *ad satisfaciendum*, which issues when a prisoner has had judgment given against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. There is, 3, the habeas corpus *ad prosequendum*, which issues to remove a prisoner in order to prosecute in any court. There is, 4, the habeas corpus *ad testificandum*, which issues to bring up a prisoner to give evidence in any court. There is, 5, the habeas corpus *ad deliberandum*, to bring up a prisoner to be tried in the proper jurisdiction wherein the fact was committed. There is, 6, the habeas corpus *ad faciendum et recipiendum*, which issues when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court. It instantly supersedes all proceedings in the court below, but, to prevent abuse, it is guarded by various statutory enactments, which need not be here enumerated. (*o*) 56 Geo. III., c. 100.

(*p*) 31 Car. II., c. 2.

(*q*) Com. Law Procedure Act, 1852, sched. B., 26.

(*r*) *Saxon v. Castle*, 6 Ad. & El., 652.

The injuries which may affect the *relative* rights of individuals, or those incident to persons considered as members of society, are such wrongs as may be done to persons in the relations of, 1, husband and wife; 2, parent and child; 3, guardian and ward; and, 4, master and servant.

3. *Injuries to a Husband.*

The injuries that may be offered to a *husband* are three: *abduction*, or taking away his wife; *adultery*, or having criminal conversation with her; and *beating*, or otherwise abusing her. 1. *Abduction* may be effected either by persuasion, or open violence: in either case the law supposes force, the wife having no power to consent. The remedy for the husband is by action of *trespass*. Whereby he recovers not the possession of his wife, but damages for taking her away. The offender may also (by statute West. 1) be imprisoned two years, and fined. The husband is also entitled to an action on the case against such as persuade the wife to live separate from him without sufficient cause. 2. *Adultery*, [*65] or criminal conversation with another's wife, is, as a *public crime, left to the coercion of the spiritual courts. As a civil injury, the law gives a satisfaction to the husband by action of *trespass*, or by action on the case against the adulterer.(s) The damages are increased and diminished by circumstances. The jury, in assessing them, generally take into consideration all the facts of the case, such as the rank of the plaintiff and defendant; the relation or connexion between them; the conduct of the husband himself; and the seduction or otherwise of the wife, founded on her previous behaviour and character. In this case, as upon indictments for polygamy, a marriage *in fact* must be proved: though generally, in other cases—as, for instance, in an action for goods supplied to the house of the parties—reputation and cohabitation are sufficient evidence of marriage. 3. The third injury is that of *beating* a man's wife, or otherwise ill-using her; for which the remedy is an action of *trespass*, which must be brought in the names of the husband and wife *jointly*. If the beating or other mal-treatment be very serious, so that the husband is deprived for any time of the assistance of his wife, the law then gives him individually an additional remedy by an action on the case for this ill-usage. In this way he may sue for the amount he has necessarily paid in curing her; a surgeon's bill, for instance. Formerly, *separate* actions were necessary,(t) but now, claims which thus arise to a husband in his own right may be sued for in the same action, in which the husband and wife are the joint plaintiffs.(u)

4. *Injury to a Parent.*

The injury that may be offered to a parent is the abduction or taking away of his child. It was long a matter of doubt whether it was a civil injury or not; but the doubt has now been set at rest, no action being

(s) *Chamberlain v. Hazelwood*, 5 M. & W. 515.

(t) *Dengate v. Gardiner*, 4 M. & W., 5. (u) Com. Law Proc. Act, 1852, s. 40.

maintainable by the father except for *the value of the lost services of the child.(v) In the action, however, to recover the value [*66] of the lost services of the child, a parent may recover damages for the seduction of his daughter, but not unless he has lost her services thereby ;(w) and such damages will be given not only as compensation for the loss of service, but for the wounded feelings of the parent.(x)

5. *Injuries to a Guardian or Ward.*

Of a similar nature to the last is the relation of *guardian* or *ward* ; and the same action that is given to a father, the guardian also has for recovery of damages when his ward is taken away from him. It may be mentioned here that the speedy and summary method of redressing complaints made by a party in the position of a ward or a guardian, is by an application to the Court of Chancery ; which is the supreme guardian of all the infants in the kingdom.

6. *Injuries to a Master or a Servant.*

To a *master* two injuries may be done. The first is, retaining his servant before his time is expired ; the other is beating or confining his servant in such a manner that he is not able to perform his work. Every master has purchased for their wages the service of his domestics ; and hiring his servant, which induces a breach of this contract, is an injury to the master, for which the remedy is by an action on the case,(y) or of *assumpsit* for the value of the servant's labour,(z) against the person who has hired the servant, or by an action against the servant for the non-performance of his agreement. If the new master did not know of the servant's former contract of service, no action lies against *him*, unless *he refuses to restore the servant on demand. The second injury, [*67] that of beating or disabling a man's servant, depends upon the same principle, viz., the property which the master has acquired in the servant's labour. Besides the remedy of an action, which the servant as an individual has against the aggressor, the master may maintain an action for any special damage he has sustained, by the beating of his servant, *per quod* he lost the value of his labour.

Such, then, are the wrongs which may be sustained by persons as individuals and as members of society ; which are denominated injuries to the rights of persons. We now come to a consideration of the injuries that may be offered to the rights of property,—which are of two kinds ; the first comprising those wrongs which affect the rights to lands or other hereditaments ; and the second those which affect the right to personal property only.

(v) *Hall v. Hollander*, 4 B. & C., 660 ; *Grinnell v. Wells*, 7 M. & G., 1033.

(w) *Harris v. Butler*, 2 M. & W., 539 ; *Eager v. Greenwood* 1 Ex., 63.

(z) *Andrews v. Askey*, 8 C. & P., 7.

(y) *Lumley v. Gye*, 2 Ell. & Bl., 216.

(x) *Foster v. Stewart*, 3 M. & S. 191.

CHAPTER III.

OF INJURIES THAT AFFECT THE RIGHT TO REAL PROPERTY.

THE following chapter is devoted to an enumeration of those injuries, that affect that species of property, which the law has denominated *real*; as being of a more permanent nature than those transitory rights of which *personal* property is the object.

They are six in number: 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

1. *Ouster.*

Ouster is a wrong that carries with it the change of possession: for thereby the wrong-doer gets into the actual occupation of the premises, and [*68] obliges him that has the right to it to seek a legal remedy; *either to regain possession or recover damages for the injury sustained. Wherever therefore a person is in the occupation of premises to which he has no right of possession, he may be supposed to have ousted or dispossessed the right owner; and, e converso, whenever the right owner, or person having the right to the premises, is thus ousted or dispossessed, his remedy is the *restitution of that possession* which is withheld from him; and, in some cases, *damages* also for the unjust dispossession. The methods whereby this remedy may be obtained are two in number.

The first is that extrajudicial and summary one, which has been already referred to, (a) viz., *Entry*; for in every case in which a person is entitled to the possession of property which is withheld from him, the law allows him to make a formal but peaceable entry thereon, declaring that he thereby takes possession. Should the person in possession resist such peaceable entry, he is entitled to do so; and in such case the entry by the rightful owner is attended with no effect whatever. He must resort to his remedy by action. If the person in possession, however, chooses to surrender the possession to the person making the entry, as, for instance, without giving up the premises, by admitting himself to be his tenant therein, then the possession is at once changed, and becomes ipso facto the possession of the person making the entry, whose title is thereby complete.

No person can now (b) make an entry, or bring an action to recover any real property, but within twenty years next after the time at which the right to make such entry, or bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time, at which the right to make such entry or bring such action shall have first accrued to the person making or bringing the same.

[*69] *This remedy by entry must be pursued in a peaceable manner, and without force. For, if one turns another out of pos-

(a) Ante, p. 3.

(b) 3 & 4 Wm. IV., 27.

session forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution by a justice of the peace, which puts the former possession in statu quo; the criminal injury, or public wrong, or breach of the peace, is punished by fine.(c)

The other mode of obtaining possession of property to which the claimant has a right, but which is withheld from him, is by an action of ejectment.

The actions by which a person ousted of real property anciently recovered possession thereof were extremely numerous. The different forms of these real actions, and the various circumstances to which each form was strictly appropriate, will be found described in the third volume of the Commentaries of Sir William Blackstone. But even in the time of Blackstone they had fallen into desuetude, and in nearly all cases of a disputed title to property, recourse was had to the action of ejectment; not however to the action of ejectment about to be described, but to the original action of trespass and ejectment, founded on an imaginary ouster of John Doe by Richard Roe, followed up by John Doe's suing Richard Roe, and Richard Roe's confessing the action, and leaving the person in actual possession of the property, to defend himself against John Doe, the proceedings of which imaginary individual, it need scarcely be suggested, were entirely directed by the real claimant of the property.(d) The old action in which John Doe was usually the plaintiff has been entirely abolished, and the new action of ejectment is now the only mode in which is tried the right to the possession of real property. After twenty years' undisturbed possession, the right of possession, and consequently the title thereby acquired, is indisputable.

It will be more convenient to describe the action *of ejectment in this place, because the proceedings in it are peculiar, and [*70] do not resemble those in personal actions, to which the third part of this treatise will be confined. This new action is created by the Common Law Procedure Act, 1852; the latter portion of which statute may, not inappropriately, be termed the Code of Procedure in Ejectment.

An action of ejectment is commenced by the issue of a writ in the following form, in which the property claimed must be described with reasonable certainty (s. 168):—(e)

Victoria, dec. to X. Y. Z., and all persons entitled to defend the possession of [here the property is described,] in the parish of , in the county of , to the possession whereof Thomas Nokes, William Nokes, and Peter Nokes, some or one of them, claim to be [or to have been on and since the day of A. D.] entitled, and to eject all other persons therefrom; these are to will and command you, or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our Court of [Queen's Bench, Common Pleas, or

(c) 8 Hen. VI., c. 9.

(d) For an account of this now abolished action of ejectment, see Black. Com. vol. iii. Common Law Commissioners' (1851) First Report.

(e) The references within parentheses are to the sections of the Common Law Procedure Act, 1852.

The person in *actual* possession is the person to *be served,^(k) [*72] for he must give immediate notice thereof to his landlord, under the penalty of forfeiting three years' rack-rent of the premises held by him. In many cases knowledge of the writ will be held by the courts as good as personal service.^(l)

Service of the writ may be effected also by leaving the copy with the wife of the tenant, either on the premises,^(m) or at the husband's house.⁽ⁿ⁾ It is necessary to show that the service was on the wife at the husband's house, in order that it may appear that they were living together as man and wife.^(o)

Service of the writ may also be effected by leaving the copy with a child, servant, or other member of the family of the tenant; but it is necessary, that the service effected in this manner, should be on the premises themselves, and that the fact of the writ having come to the hands of the person to be served, should be subsequently acknowledged by the tenant himself,^(p) for an acknowledgment to that effect by the tenant's wife only will not be sufficient.

It is impossible, however, in a mere outline like the present, to attempt any explanation of the many nice distinctions, that have been made between what is good and what is insufficient service. The reader who desires such information must consult some book of "PRACTICE"—a character to which the present compilation has no pretensions—the author's object being solely to point out to the reader, the leading principles on which that practice is founded.

The writ, also, in case of vacant possession may be served by posting a copy thereof, upon the door of the dwelling-house or other conspicuous part of the property claimed.

A distinction must, therefore, be drawn between what constitutes in the eye of the law an actual, and what a vacant possession. Thus, where the person has removed, but has left beer in the cellar, or hay in the barn, the claimant cannot proceed as on a *vacant possession. And if [*73] the residence of the tenant of land where there is no house is known, he must be served.^(q) But if the tenant have locked up and quitted the house, the claimant must proceed as on a vacant possession.^(r) So if the house has been pulled down;^(s) and so if the premises are untenanted, and there is no property in them—unfinished houses, for instance.^(t) If some only of the houses claimed are vacant, and if they are included in the lease with others, the claimant cannot proceed as on a vacant possession;^(u) but in such circumstances the court will interfere summarily, and direct service to be effected by sticking up copies of the writ, and also by serving copies on the parties, who can be shown to be

(k) Doe d. Darlington v. Cock, 4 B. & C., 259.

(l) Doe d. Hope v. Roe, 3 C. B. 771.

(m) Goodright v. Thrustout, 2 Wm. Bl., 800.

(n) Doe d. Graef v. Roe, 6 Dowl., 456.

(o) Doe d. Morland v. Baylis, 6 T. R., 785.

(p) Doe d. Royle v. Roe, 5 C. B., 256, 258.

(q) Savage v. Dent, 2 Str., 1064.

(r) Doe d. Portarlington v. Roe, 4 B. & C., 259.

(s) Doe d. Norman v. Roe, 399.

(t) Doe d. Schovell v. Roe, 3 Dowl., 691.

(u) Doe d. Timothy v. Roe, 8 Scott, 126.

interested in the property : (v) for the Common Law Procedure Act expressly directs, that service may be effected in such manner as the court or a judge shall order.

If no appearance be entered within the time appointed, the claimant, on filing an affidavit of the proper service of the writ, (w) may sign judgment, that the person, whose title is stated in the writ, shall recover possession of the property.

This judgment by default is in the following form :—

*In the Queen's Bench [Common Pleas or Exchequer of Pleas :]
The day of 18 [date of writ.]
Lancashire, } On the day and year above written, a writ of our Lady
to wit. } the Queen issued forth of this court in these words ; that is
to say,*

Victoria, by the grace of God [here is copied the writ] ; and no appearance has been entered or defence made to the said writ : therefore it is considered that the said [here is inserted the name of the person in whom title is alleged in the writ] do recover possession of the land in the said writ mentioned, with the appurtenances.

[*74] *It ought to be mentioned, that a defendant may defend for a part only of the premises, sought to be recovered by the claimant (s. 174). If so, his course is to appear to the writ, but to give notice at the same time to the claimant, that he limits his defence to part only of the premises.

If an appearance, then, is entered, but a notice limiting the defence to part only of the premises is also given, the claimant may sign a judgment for that part of the premises, to which the notice does not apply, and proceed with the action as to the remaining part of the premises.

It ought also to be mentioned here, that this "signing judgment" is merely obtaining the leave of the master of the court, for the claimant to enter the judgment of the court as in his favour. No formal judgment need be entered up, for the claimant may sign judgment, tax costs, and issue execution on an incipitur, which is merely the paper (so called because it contains the first words of the judgment), on which the master certifies, as I have stated, the claimant's right to judgment. The persons named in the writ as defendants, or either of them, may appear within the time appointed (s. 171), by entering an appearance at the office of the court, from which the writ issues in this form :—

*In the Queen's Bench [Common Pleas or Exchequer of Pleas :]
Ejectment.*

*[Thomas Nokes, William Nokes,
& Peter Nokes], claimants,
against
[John Styles], defendant.
Entered the day of 18 .*

D. E. C., attorney for the defendant, appears for him.

(v) Doe d. Chippendale v. Roe, 7 C. B., 125.

(w) R. G. H. T., 112. Post, Part III. Chap. IV.

Any other person not named in such writ may be allowed to appear and defend, on filing an affidavit, showing that he is in possession of the land either by himself or his tenant. The tenant in possession, we have seen, is bound to give his landlord immediate *notice of a writ of ejectment; for frequently, nay, in most cases, the tenant has no [*75] interest in the premises beyond his temporary occupation. His landlord and other parties may, however, have a most important interest to defend that possession; for the title to the property itself is now tried in this action.

Thus the court has permitted a mortgagee out of possession to be made defendant. So an heir who had never been in possession, and a devisee in trust in the same position, have been admitted to defend. But no person claiming adversely to the title of the tenant in possession will be admitted to defend;(x) and if admitted, he will not be allowed to set up such inconsistent title, as a defence at the trial.(y) For otherwise at the trial, there might be as many titles to try as there were defendants, instead of the single title of the claimant; who must, in all cases, recover by the strength of his own title only, and not on the weakness of the defendants.(z)

The tenant in actual possession is the person called on by the writ to deliver up the premises to the claimant.

It is not necessary therefore for the landlord to become a defendant in order to make his title admissible in evidence. He may, with the tenant's consent, defend in the tenant's name. In an action so defended, where the claimant, having knowledge thereof, obtained from the tenant a retraxit, or withdrawal of the defence, and a cognovit, or confession of the action, the court, in the exercise of its equitable jurisdiction, set aside the judgment.(a)

The application by a party not named on the writ, for leave to appear and defend, should be made as soon as he has notice of the writ, so that an appearance may be entered within the sixteen days allowed for doing so. Further time to appear, and a stay *of proceedings, may be obtained from a judge at chambers, should either be necessary. [*76] If judgment has been signed (s. 177), the application should also be to set aside the judgment; for the court will not, in general, allow the possession of property to be changed, where there has been no trial or opportunity of trying the cause; and therefore will set aside a regular judgment, and admit the landlord to defend, if the tenant has not given him notice.(b) And after judgment signed and execution executed, a judge at chambers may order the judgment and subsequent proceedings to be set aside on payment of costs, and a party to be let in to defend as tenant; as where the attorney, having been duly instructed, inadvertently neglected to appear in time.(c) But as a general rule, the court will not interfere

(x) Doe d. Horton v. Rys, 2 Y. & J., 88.

(y) Doe d. Mee v. Litherland, 4 A. & E., 784; Doe v. Challis, 20 L. J. R., 278, Q. B.

(z) Martin v. Strachan, 5 T. R. 107. (n.)

(a) Doe d. Locke v. Franklin, 7 Taunt., 9.

(b) Doe d. Troughton v. Roe, 4 Burr. 1996; Dodds v. Passer, 2 Str., 975.

(c) Doe d. Mullarky v. Roe, 11 A. & E., 333.

after execution executed; (d) unless, indeed, in the case of inadvertence, as where it was shown that the landlord had never got notice, his wife having locked up the copy served on her, thinking that it related to a former action, and was of no importance. (e) In the case of collusion between the tenant and the claimant, the court will always interfere: (f) and, indeed, in no proceedings whatever, have the courts been oftener called upon to interfere summarily, in the exercise of their equitable jurisdiction, than in the proceedings in ejectment.

As I have already had occasion to state, any person appearing to a writ of ejectment is at liberty to limit his defence to a part only of the property claimed, which he must describe with reasonable certainty, in a notice to be served within four days after appearance, upon the attorney whose name is endorsed on the writ, if any, and if none, then to be filed [*77] in the master's office. An appearance without a *notice confining the defence to part, is deemed an appearance to defend for the whole property claimed.

The notice may be in this form :—

In the Queen's Bench [Common Pleas or Exchequer of Pleas :]

Between { [Thomas Nokes, William Nokes,
and Peter Nokes,] claimants,
and
[John Styles,] defendant.

I, D. E. C., as the attorney for and on behalf of John Styles, the above-named defendant, do hereby give you notice, that I limit the defence in this action to a part only of the property mentioned in the writ of ejectment in this cause; that is to say, to that part of the said property which consists of [here the part defended for is to be described.]

Yours, &c.,

(Signed)

D. E. C.,

To Mr. H. J. S., claimant's attorney.

By the writ, the claimant has asserted his right to the property claimed. By entering an appearance, the defendant has denied that right in point of fact. The parties therefore are at issue, and the claimant ought now to proceed to prove his right, or the affirmative of the fact he has stated, before a jury; for, as we have seen, he can recover on the strength of that title only.

The claimant may, however, be doubtful of success in his action, and may wish to discontinue it. He is at liberty to do so by giving a notice to that effect to the defendant, who may thereupon sign judgment for his costs (s. 200.)

The defendant may, in the same manner as the claimant, by a notice to him confess the action as to the whole or a part of the property sought to be recovered, whereupon the claimant may sign judgment for the recovery of possession and costs (s. 203.)

(d) *Goodtitle v. Badtitle*, 4 Taunt., 850; *Doe d. Thomson v. Roe*, 4 Dowl., 115.

(e) *Doe d. Butler v. Roe*, 2 Har. & Wol., 130.

(f) *Goodtitle v. Badtitle*, sup.; *Doe d. Grocers' Company v. Roe*, 5 Taunt., 205.

In a similar way one of several claimants may discontinue; or one of several defendants confess the action, the name of the claimant in the former case *being merely struck out of the proceedings, and the claimant in the latter case signing judgment against the individual [*78] defendant, who has admitted his right to recover.

But if the claimant does not discontinue, and the defendant does not confess the action, the parties must proceed to trial.

In the third part of this treatise, a more convenient opportunity will present itself for describing the constitution of a jury, the mode in which it is summoned, and the manner in which actions generally are tried. At present it is necessary only to state, that by the jury are tried the issues in fact, which arise between the suitors in the superior courts. For when one party asserts a fact, which the other party denies, they are at once *at issue* upon that fact, and the jury alone can decide which party is right. The whole of the proceedings in our courts are calculated to raise either these questions, or issues in fact, or else an issue in law, which arises when the parties admit the facts, but differ as to the law arising therefrom.

At present, as we have seen, the issue in ejectment is generally one of fact, and it is stated in what is called the *Issue*, for the determination of the jury upon it; for when an appearance is entered, an issue may at once be made up, setting forth the writ, and stating the fact of the appearance, (and the notice limiting the defence, if any,) of each of the persons appearing, and directing the sheriff to summon a jury.

The form of this issue is as follows:—

In the Queen's Bench :

On the day of A. D. 18 [date of writ.]
Lancashire, } On the day and year above written, a writ of our Lady
to wit. } the Queen issued forth of this court, in these words; that
is to say,

Victoria, by the grace of God [here is copied the writ,] *and John Styles has, on the day of appeared by D. E. C., his attorney [or in person,] to the said writ, and defended for the whole of the land therein mentioned : Therefore, let a jury come, &c.*

*In the margin of the issue is stated the venue, " Lancashire to wit," which is the vicinetum, or county from which the jury [*79] is to be summoned. The venue in this action is *local*, that is, the issue must be tried by a jury from the county where the property is situated. But on the application of either party the venue may be changed, and the order to change being suggested on the record, the trial may be had in the venue named in the order (s. 182). Thus the court has changed the venue, on being satisfied by affidavit that a fair trial could not be had in the county where the venue is laid.(g) But the court will not change the venue, except on special grounds, nor if special grounds exist for not changing it.(h)

(g) Bell v. Harrison, 4 Dowl., 181; Briscoe v. Roberts, 3 Dowl. 434.

(h) Doe v. Harmer, 1 Har. and Wol., 80.

The party desirous to change the venue does so by applying at judge's chambers

The issue being made up, the parties may now go to trial. The facts may not, however, be disputed. If so, the parties may save the expense of a trial, by stating these facts for the opinion of the court in a special case, which by leave of a judge they may do. A special case states the facts as if they had been found by a jury, and leaves it to the court, on that statement, to give judgment for the claimant or defendant according to law. But if the parties do not agree on a special case, the next step is the trial.

[*80] *The claimant must give ten days' notice of trial.(i) If he fail to do so, and to go to trial, the defendant may give him twenty days' notice to proceed to trial at the sittings or assizes next after such notice. If the claimant fail in giving notice for such sittings or assizes, or in proceeding to trial in pursuance of the defendant's notice, and the time for going to trial has not been extended by the court or a judge, the defendant may sign judgment for his costs (s. 202).

The parties proceed to trial upon the issue, in the same manner as in other actions. As I have already stated, a more convenient opportunity will present itself for describing the proceedings at a trial before a jury. In the meantime it is enough to state, that in an action of ejectment the question for the jury is, whether the statement in the writ of the title of the claimants is true or false; and, if true, then which of the claimants is entitled; whether to the whole or to part; and if to part, then to what part of the property. The verdict of the jury,(k) if a general verdict for the claimant, is entered in this form:—

Afterwards, on the day of , A. D. , before and , justices of our Lady the Queen assigned to take the assizes in and for the within county, come the parties within mentioned; and a jury of the said county being sworn to try the matters in question between the said parties, upon their oath say, that Thomas Nokes [the claimant] within mentioned, on the day of , A. D. , was, and still is,

for a summons, which is to be served on the opposite party,—that is, upon his attorney,—and calls upon him to show cause why the “issue joined in this action “should not be tried in the county of Cumberland, and not in the county of Lancaster, in which the venue in this action is laid; and why, for that purpose, a “suggestion should not be entered on the record that the trial may be more conveniently had in the said county of Cumberland, according to the Common Law Procedure Act, 1852.”

If the judge, on hearing the parties at the return of the summons, orders the venue to be changed, a suggestion to that effect is entered on the record after the joinder of issue in this form:—

But because it is suggested, and manifestly appears to the court, that the trial of the issue above joined, may be more conveniently had in the county of Cumberland,—Therefore let a jury of the said county of Cumberland come, &c.

(i) The form and general requisites of a notice of trial, or of continuance or countermand, will be referred to in the Third Part of the Treatise.

(k) The jury may in an action of ejectment, as in other actions, find a special verdict; that is, may state all the facts they find proved specifically, leaving it to the court to apply the law to these facts, and give judgment accordingly. There are other proceedings which may take place at the trial, such as the tendering of a bill of exceptions; but these proceedings, and also proceedings in error, will, to avoid repetition, be more conveniently described afterwards.

entitled to the possession of the land within mentioned, as in the writ alleged: Therefore, &c.

If the claimant recovers a part only of the premises for which the action is brought, the defendant *will be entitled to have his costs of defending for the part, for which the claimant has been [*81] unsuccessful, set off against the costs of the claimant.(l)

If, at the trial, the claimant appears and the defendant does not, the claimant is entitled to recover without giving any evidence of his title, upon which he shall have judgment for his costs of suit.(m) If the defendant appears and the claimant makes default, the latter will be nonsuited, that is, will be adjudged to have abandoned his action; in which case the defendant may sign judgment for the costs of his defence.

If the title of the claimant (that is, his right to possession of the premises,) existed as alleged in the writ, but also appears to have expired before the trial, he will still have a verdict and judgment for his costs (s. 181), for the defendant has wrongfully resisted his rightful claim.

Upon a finding for the claimant, judgment may be signed, and execution issued for the recovery of possession of the property (or such part thereof as the jury may find the claimant entitled to), and also for costs, in term, within five days after the verdict, or in vacation, within fourteen days after verdict, unless the judge shall otherwise order (s. 185). So upon a finding for the defendants or any of them, judgment may be signed, and execution issued for costs within the same periods (s. 186). The object of that delay is, in a cause tried during term, to enable the unsuccessful party to apply to the court, if he thinks fit so to do, for a new trial. The grounds on which new trials are generally granted will be stated more conveniently, when I come to the subject of new trials generally in ordinary actions. The delay of fifteen days in a cause tried in vacation, again, is that the unsuccessful party may, if he can do so, show such grounds to the judge who tried the cause, as will justify that judge in granting a stay of proceedings, until an application for a new trial can be made to the court.

*As already stated, it is not necessary, before issuing execution, to enter the proceedings on the judgment roll, but an incipitur may be made, judgment signed, and execution issued, as heretofore. The proceedings may be entered on the roll whenever it may become necessary to do so, as for the purpose of giving the judgment in evidence, bringing error, or the like (s. 206). [*82]

There may be either one or separate writs, for recovery of possession and for costs (s. 187), that is, the claimant may either issue a writ of habere facias possessionem, to recover possession of the premises themselves, and a separate writ of fi. fa. or ca. sa. for the costs, or he may sue out, as hitherto, a writ of habere, adding a fi. fa. or ca. sa. to it as the case may be.(n)

The suing out of one or of several writs depends generally upon the

(l) Doe v. Errington, 4 Dowl., 602.

(m) R. G. H. T., 1853, 114.

(n) These several writs will be described in the Third Part of this Treatise in reference to execution in ordinary actions.

fact of the defendant being resident, or having goods and chattels, in the same county as that in which the property, of which possession is to be given, is situate. The writ of habere can only issue into the county where the property recovered by the judgment lies; the writ of *ca. sa.* or *fi. fa.* may issue into any county (s. 121).

These writs, or either of them, the forms(o) of which are prescribed by rules of court, are prepared by the claimant, and sealed on production of the incipitur.

A writ of execution thus sealed is then put into the hands of the sheriff of the county into which it is issued, (in practice, into the hands of his deputy, for each sheriff we have seen must have a deputy resident within a mile of the Inner Temple Hall, London), whose duty it is to execute it with all convenient speed; but the sheriff's duties generally with regard to writs will be more conveniently described afterwards.(p)

The writ of habere, like the writ of *fi. fa.* is returnable immediately [*83] after the execution thereof; *that is, the sheriff must certify to the court what he has done under the writ.(q)

Such are the ordinary proceedings in the action of ejectment. It is not necessary to do more than refer to those provisions of the Common Law Procedure Act, 1852, which permit suggestions of the death of parties to be entered, and the action to be thereupon continued by or against the surviving parties, or the representatives of those who have died. Neither is it perhaps desirable to make other than passing mention of the enactments of the same statute, as to proceedings in *error*, which may be brought on the judgment in ejectment in the same manner as in other actions. It may be brought after a special verdict, or a bill of exceptions, or by consent after a special case.

The nature of these proceedings will be better explained afterwards; but in order that a person who has been found entitled to the possession of his property, may not be improperly kept ousted or dispossessed, it is to be remembered, that, except in the case of such consent by him to a special case, execution will not be stayed, unless the plaintiff in error (i. e.) the defendant in the action, gives bail for double the yearly value of the property and double the costs. And in the event of judgment against him, the Court of error may issue a writ of inquiry, the nature of which has been formerly explained,(r) as *mesne profits*, &c., which have accrued since the previous judgment in ejectment, upon the return of which writ, judgment is to be given, and execution awarded for such *mesne profits*, and for any damages that may have been caused to the premises, and for the costs of suit (s. 208). The bail-bond, where the claimant brings error, is to be conditioned for payment of the costs, if he discontinues or the judgment is affirmed, and of such other sum as may be awarded.

In the original action of trespass and ejectment, the plaintiff sought [*84] to recover damages for the trespass; *but so soon as that action took a shape, in which the title to the property was considered the

(o) R. G. H. T., 1853, Appendix 8.

(p) Post, Part III., Execution.

(q) Doe d. Hudson v. Roe, 21 L. J. R., 359, Q. B.

(r) Ante, p. 45.

principal question, the damages awarded were merely nominal. In the new action of ejectment, no damages are awarded at all. In order therefore to complete the remedy, when possession has long been detained from the rightful owner, an action of trespass also lies after a verdict in ejectment, to recover the mesne profits which the tenant in possession, or any person who has come in under him, has wrongfully received.^(s) In this action the judgment in ejectment is conclusive evidence for all profits which have accrued since the date alleged in the writ, as that at which the claimant first had right to the property; but if the plaintiff seek to recover the mesne profits for more than six years, the defendant may plead the Statute of Limitations. So if he sue for any profits, accrued antecedent to the date in the writ, the defendant may make a new defence. The plaintiff, however, may also include in his action such damage as he has sustained, in the shape of the costs of the action.^(t) In ejectment by a landlord against his tenant,^(u) however where the latter has had due notice of trial, the claimant may go on, after proving his right to recover,^(v) to give evidence of the mesne profits, and the jury give their verdict on the whole matter, both as to the title and mesne profits; so that in such cases, a second action for mesne profits is unnecessary, unless the defendant continue wrongfully to withhold possession of the premises.

Although in this action of ejectment is now tried the *title* to real estates, it is not an adequate means to try the title of all real property, nor to remedy every ouster known to the law. Thus ejectment will not lie for an advowson, the right to which is tried by a *quare impedit*, nor for a dower, nor for a canonry,^(w) nor for a tin bound,^(x) nor in general for *any incorporeal hereditament; as, for instance, a *water-course*, any injury to which must be remedied by an action on [^{*85}] *the case*.^(y) On none of these, be it observed, could an entry have been made by *John Doe*, that he might have complained of the ouster. For tithes in the hands of lay appropriators, by the express purview of 82 Hen. VIII., c. 7, ejectment lies, and this doctrine has been extended by analogy to tithes in the hands of the clergy. This action may also be brought by one joint tenant, tenant in common, or coparcener, against the other joint tenants, tenants in common, or coparceners.^(z) But in such cases an *actual ouster* must be proved.^(a) In the ordinary cases, the mere withholding of possession, by the defendant is the ouster on which the action is founded.

Before leaving the subject of ejectment, it ought to be mentioned that this action is a very expeditious remedy to landlords whose tenants are in arrear, and on whose premises there is no sufficient distress.^(b) It is

(s) *Aslin v. Parker*, 2 Burr., 665; *Doe d. Whitcomb*, 8 Bing., 46.

(t) *Doe v. Filliter*, 13 M. & W., 47.

(u) Com. Law Procedure Act, 1852, s. 214.

(v) *Howard v. Williams*, 21, "Law Times," 264.

(w) *Doe d. Butcher v. Musgrave*, 1 M. & G. 625.

(x) *Doe v. Earl of Falmouth*, 1 M. & W., 210.

(y) *Challoner v. Thomas*, Yelv., 143.

(z) Com. Law Procedure Act, 1852, ss. 188, 189.

(a) As if one joint tenant takes the profits of the whole estate. *Doe v. Bird*, 11 East, 49; *Doe v. Horn*, 5 M. & W., 564.

(b) 4 Geo. II., c. 28; Com. Law Proc. Act, 1852, ss. 210, 211, 212.

FEBRUARY, 1854.—5

an equally summary remedy, in certain cases, to landlords whose tenants hold over after their term has expired or been determined; (c) and it ought to be mentioned further, that where a landlord's right of entry accrues in or after Hilary or Trinity terms, the time within which the defendant must appear, and the notice of trial to be given to him are shorter than in ordinary cases, when the action is brought to recover possession of lands in any county other than London or Middlesex, (d) for otherwise the claimant might be thrown out of the assizes, and delayed six months.

Besides these remedies, there is a summary proceeding for restoring to landlords possession of premises, which a tenant has deserted; (e) and [*86] in the New *County Courts, premises let at a rent not exceeding 50*l.* per annum, (f) and before the justices in petty sessions, premises let at a rent not exceeding 20*l.* per annum, (g) may be recovered by landlords by a very short and inexpensive procedure.

There is another species of ouster, viz., depriving a widow of her dower, for which the law gives her one of two remedies, the writ of *right of dower*, or the writ of dower unde nihil habet, according to the special circumstances of the case. These are two of the three real actions which have not been abolished, (h) the consideration of which however does not form part of our subject. The law and practice as to writs of dower will be found at length in *William v. Gwyn*, 2 Wms. Saund. 42 r., and the cases are collected in *Garrard v. Tuck*, 8 C. B. 231.

2. *Trespass.*

The second species of injury that may affect real property is that of *trespass*, or, technically, *trespass quare clausum fregit*.

Trespass, in its most extensive sense, signifies any offence against the law. Therefore beating another is a trespass; (i) taking or detaining another's goods are trespasses: so also non-performance of one's undertaking is a trespass, upon which the modern action of *assumpsit*, which is in its original an action of *trespass on the case*, is grounded: and any act whereby another is damnified, is a trespass in its largest sense; for which, as before explained, (i) when the act is directly injurious, an action of trespass will lie; but, when the injury is only consequential, an action *on the case*.

In its limited sense, i. e., in relation to real property, it signifies no more than an entry on another's ground without lawful authority, and doing some *damage, however inconsiderable. For the right of [*87] property once established, this right must necessarily be exclusive; and every entry on another's property, without the owner's leave, is necessarily therefore a trespass, for which the injury being direct, an action of trespass will lie. The amount of satisfaction, it is the office of the jury to assess or determine, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage, if any, sustained.

(c) 1 Geo. IV., c. 87; Com. Law Proc. Act, 1852, ss. 213, 214.

(d) 11 Geo. IV. and 1 Will. IV., c. 70, s. 36; Com. Law Proc. Act. 1852, s. 217.

(e) 11 Geo. II., c. 17, s. 16; 57 Geo. III., c. 52.

(f) 9 & 10 Vict., c. 95, s. 112; *Banks v. Robbeck*, 2 L. M. & P., 452.

(g) 1 & 2 Vict., c. 74.

(h) *Ante*, p. 57.

(i) *Ante*, p. 59.

Every unwarrantable entry on another's soil the law entitles a trespass by *breaking his close*; the words of the ancient writ of trespass, when original writs were in use, commanding the defendant to show cause, *quare clausum querentis fregit*. "For every man's land is in the eye of the law enclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other;" for, if no other special damage can be assigned, the mere treading down of the herbage may be stated to be the injury sustained.

One must have an actual or constructive possession in order to be able to maintain this action: (k) thus a mortgagee who has not obtained *actual* possession cannot maintain trespass; (l) while the owner of a fishery, who has leased the fishery, but not done so by deed, which is necessary to divest his possession, can do so, having still the *constructive* possession. (m) And any actual possession is good against a wrong doer, (n) unless the defendant can show a better title. (o)

"A man is answerable for not only his own trespass, but that of his cattle also: for if by his *negligent keeping they stray [*88] upon the land of another, (and much more if he permits or drives them on) and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus damage *faisant*, or doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy in *foro contentioso*, by action."

In some cases trespass, or rather entry on another's land or house, is justifiable. Thus if a man comes to demand or pay money, there payable, or to execute, in a legal manner, the process of the law, or by the license of the owner, it is no trespass. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; or a reversioner, to see if any waste be committed on the estate. So a man may justify entering an inn or public house, without the leave of the owner specially asked; because a man keeping such a public house, thereby gives a general license to any person to enter his doors. "But in cases where a man misdemeanors himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio*: (p) as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. But a bare nonfeasance, as not paying for the wine he calls for, will not make

(k) *Brown v. Notley*, 3 Ex., 219.

(l) *Turner v. Cameron Coal Co.*, 5 Ex., 932.

(m) *Duke of Somerset v. Fagwell*, 5 B. & C., 875. And see *Wood v. Ledbetter*, 13 M. & W., 842.

(n) *Graham v. Feat*, 1 East, 245.

(o) *Brown v. Dawson*, 12 A. & E., 629.

(p) *The Six Carpenters' case*, 1 Smith's L. C., 62.

him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or assumpsit against him.”(q)

A man may justify in trespass also on various other grounds; as on account of the right of entry being in himself; a defence which brings [*89] the title *of the property in question. But this mode of trying title is not so usual as that by ejectment, because that gives possession of the land: whereas in trespass, the right only can be ascertained, but no possession delivered, nothing being recovered but damages for the trespass itself. So one may justify by showing a right of way,(r) or a right of common;(s) the varieties of which rights, it would be out of place to attempt to enumerate here.

It may be mentioned here, that in order to prevent vexatious actions of trespass, it is enacted by several statutes (3 and 4 Vic., c. 24; 4 and 5 Vict., c. 28,) that if a plaintiff recovers less damages than forty shillings, he shall not be entitled to recover any costs whatever, unless the judge shall certify on the back of the record that the action was really brought to try a right, besides the mere right to recover damages for the grievance for which the action is brought. This rule admits of one exception, made by the statute 8 and 9 Will. III., c. 11, which enacts, that in all actions of trespass, wherein it appears that the trespass was wilful and malicious, and it is so certified by the judge, the plaintiff shall recover full costs. Every trespass is *wilful*, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is *malicious*, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to be to harass and distress the plaintiff.”

3. Nuisance.

The third species of the injuries that may affect real property are *nuisances*, which, as we have seen, are either *public* or *common* nuisances; or else *private* nuisances, which may be defined anything done to the injury of the lands, premises, or hereditaments of another, not amounting to the direct injury of trespass.

[*90] *Nuisances are of two kinds: *first*, such as affect corporeal hereditaments; and *secondly*, such as damage incorporeal hereditaments.]

1. If a man builds a house so that his roof overhangs mine, and throws the water upon it, this is a nuisance for which an action will lie.(t) So if he erect a house so near to mine that it obstructs my ancient lights. But in this case the windows must be *ancient*, that is, have been there for twenty years at least,(u) otherwise there is no injury done. So if one keeps his goods, or allows filth to accumulate on his own premises,(v)

(q) *Sunbolf v. Alford*, 3 M. & W., 248.

(r) *Colchester v. Roberts*, 4 M. & W., 769. *Holford v. Hawkinson*, 5 Q. B., 584.

(s) *Miller v. Spateman*, 1 Wms. Saund., 346 n.

(t) *Fay v. Prentice*, 1 C. B., 828.

(u) 2 Wms. Saund., 175 a. *Cross v. Lewis*, 2 B. & C., 686.

(v) *Jones v. Williams*, 11 M. & W., 176.

so near the house of another that the stench makes the air unwholesome, this is nuisance. So if one's neighbour sets up and exercises any offensive trade, as a tanner's, a tallow-chandler's,^(w) or the like,^(x) this is a nuisance, for though these are lawful trades, yet they should be exercised in remote places; for the rule is "*sic utere tuo, ut alienum non lædas.*" So if one creates unusual noises to the disturbance of his neighbours, such as a perpetual ringing of bells,^(y) this is a nuisance.

As to *lands*, if one erects a smelting-house for lead so near the land of another, that the vapour kills his corn and grass, and damages his cattle, this is a nuisance. So it is a nuisance if one allows the boughs of his trees to grow, so that they overhang his neighbour's land.^(z) In short, if one does any act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will not be offensive. And a nuisance may be the result of acts of *omission* or negligence, as well as of acts of *commission*. Thus if my neighbour ought to cleanse a drain, and omits to do so, whereby my *premises are damaged, this is a nuisance for which an action [^{*91}] will lie.^(a)

2. As to *incorporeal hereditaments*, the law is the same. Thus it is a nuisance to abstract, divert, or pollute a watercourse,^(b) or a pond from which another waters cattle.^(c) So if I have a way annexed to my estate^(d) across another's land, and he obstructs me in the use of it, it is a nuisance.^(e) And the same rule applies to a navigable creek, any obstruction to which is actionable.^(f) So if I am entitled to hold a market, and another person sets up a market so near mine that he does me a prejudice, it is a nuisance to the right which I have in my market,^(g) which right the law will not allow to be injured even indirectly.^(h) So if a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one.⁽ⁱ⁾ "But where the reason ceases, the law also ceases with it; therefore, it is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in neighbourhood or rivalry with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria.*"

As to the remedies for this injury, the law, it is to be observed, gives no *private* remedy for anything but a *private* wrong. Therefore, in gen-

(w) *Hale v. Bliss*, 4 Bing., N. C., 183. (x) *R. v. Wild*, 1 Burr., 337.

(y) *Soltan v. De Held*, 21 L. J. R., 153 Ch.

(z) *Earl of Lonsdale v. Nelson*, 2 B. & C. 311.

(a) *Russell v. Shenton*, 3 Q. B., 449.

(b) *Wood v. Waud*, 3 Ex., 748. *Embrey v. Owen*, 6 Ex., 353.

(c) *Manning v. Wardale*, 5 A. & E., 758. (d) *Ackroyd v. Smith*, 10 C. B., 164.

(e) *Bright v. Walker*, 2 Cr. M. & R., 211.

(f) *Bowen v. Hill*, 1 Bing., N. C., 549.

(g) *Yard v. Ford*, 2; *Wms. Saund.*, 172; and see *Mayor of Macclesfield v. Chapman*, 12 M. & W., 20 note. (h) *Bridgland v. Shapter*, 4 M. & W., 375.

(i) *Pim v. Carrell*, 6 M. & W., 234. *Shields Ferry Company v. Barker*, 2 Ex., 134.

eral, no action lies for a public or common nuisance, but an *indictment* only.^(k) Yet this rule admits of exception, for if a private person suffers [*92] extraordinary damage *by a public nuisance, he may have a satisfaction for the damage by action. Thus if a man suffer an injury by falling into a ditch dug across a public way, which is a common nuisance, for this particular damage he may have an action. So if ploughs, harrows, or other articles, are improperly put on a highway, and a man is thereby injured, he may have an action.^(l) So if rubbish is improperly left on a highway.^(m) And indeed an action will lie, if an authorized obstruction to a highway is continued an unreasonable time, so that the plaintiff thereby sustains damage.⁽ⁿ⁾ But if a man has abated a nuisance (as the party injured has a right to do),^(o) he is not entitled to an action. For he had a choice of remedies: either without suit, to abate it himself; or by suit, in which he may recover damages, and ultimately remove it by the aid of the law. Having made his election by adopting one remedy, he is precluded from the other.

The legal remedy is by action *on the case*, in which the party injured only recovers damages. He cannot thereby remove the nuisance. But every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie,^(p) and exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardness to continue it.^(q)

4. Waste.

The fourth species of injury that may affect real property is that of *waste*, which is defined to be a spoil and destruction of the estate, either in houses, woods, or lands, thereby rendering it wild and desolate, which the common law expresses very significantly by the word *vastum*. And this *vastum* or waste is either voluntary or permissive.^(r) Thus to [*93] pull down a house, or to cut timber is voluntary waste. So to cut down willows which afford shelter to a house, or grub up fences, is voluntary waste.^(s) And if by the negligence of my servant, a fire extends to my neighbours premises and does damage, this is an injury in the nature of permissive waste, for which I will be liable.^(t)

The persons who may be thus injured are such only as have some interest in the estate wasted; for an absolute proprietor may commit whatever waste he likes, without being accountable to any one.

And the interest most usually affected by this commission of waste, is that of a person who has the remainder or reversion of the inheritance, after a particular estate for life or years in being. If the particular ten-

(k) *Hubert v. Groves*, 1 Esp., 148.

(l) *Marriot v. Stanley*, 1 M. & G., 568.

(m) *Goldthorp v. Hardman*, 13 M. & W., 377.

(n) *Wilkes v. Hungerford Market Co.*, 2 Bing., N. C., 281.

(o) After a notice only in certain cases. *Jones v. Williams*, 11 M. & W., 176.

(p) *Thomson v. Gibson*, 7 M. & W., 456.

(q) *Shadwell v. Hutchinson*, 2 B. & Ad., 97.

(r) *Martin v. Gilham*, 7 Ad. & El., 540.

(s) *Phillips v. Smith*, 14 M. & W., 589.

(t) *Vaughan v. Menlove*, 3 Bing., N. C., 468. *Filliter v. Phippard*, 11 Q. B., 347.

ant, i. e., the person who has the present estate and possession (as, for instance, the tenant in dower or by the custody of England, or the lessee for life or for years), commits or suffers any waste, it is a manifest injury to him that has the reversion, or inheritance, as it tends to deprive it of its most desirable incidents. To him, therefore, to whom the *inheritance* thus appertains in remainder or reversion, the law has given a remedy; for he, who has the remainder *for life* only, is not entitled to sue for waste, since his interest may perhaps never come into possession; yet a parson who is seised in right of his church of any remainder or reversion, may have an action of waste; for he, for the benefit of the church and of his successor, has a qualified fee-simple therein, and may therefore maintain the action, which is generally termed an action for dilapidations.^(u)

One species of interest which is injured by waste, is that of one, who has a right of common in the place wasted, especially if it be common of estovers, or the right to cut wood for repairs of his house, ploughs, &c., &c. For if the owner of the wood demolishes the whole wood, he thereby destroys all possibility of **taking estovers*, for which injury the [*94] commoner has an action.

The redress for this injury of waste is of two kinds, preventive and corrective. The first is obtainable in the Courts of Equity, which grant an injunction to restrain waste, until the defendant shall have put in his answer, on which the court makes further order. This has long been the usual and only way of preventing waste.^(v) The remedy at law is only corrective, and it is by the universally remedial action on the case for damages.^(w)

5. Subtraction.

Subtraction is the fifth species of injury affecting real property, and it happens, when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it.

1. Fealty, suit of court, and rent, are services said to arise *ratione tenuræ*, being the conditions upon which the lords of manors anciently granted out their lands to their feudatories or vassals, now called copyholders: whereby it was stipulated, first, that they should take the oath of fealty to their lord; secondly, that they should do suit, or attend the lord's courts; and, thirdly, that they should pay to the lord certain stated returns, in military attendance, in provisions, in arms, in articles of ornament or pleasure, in labour, or in money, which will provide all the rest. All these are comprised under the name of *reditus*, return, or rent. And the subtraction or non-observance of any of these conditions is an injury to the lord, by diminishing the value of his seignior.

The general remedy for all these is by *distress*; and it is the only

^(u) Bryan v. Clay, 1 El. & Bl., 38.

^(v) The Common Law Commissioners (2nd Report, 1853) have recommended that the Courts of Common Law should be empowered to restrain waste, and this suggestion will in all probability be carried into effect immediately by the Legislature.

^(w) Harnett v. Maitland, 16 M. & W., 257.

remedy at common law for the two first. The nature of distresses, their incidents and consequences, will be hereafter explained; but it may be [*95] stated here, that while distresses must generally be reasonable (for otherwise the distrainer runs the risk of an action for an excessive distress), in the case of distress for fealty or suit of court, no distress can be unreasonable or too large: (x) for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and, be it of what value it will, there is no harm done, especially as being a distress at common law, it cannot, as we shall see, be sold or made away with, but must be restored immediately on satisfaction made.

The other remedy for subtraction of rent is by an action of *debt*, for the breach of the contract, which exists between parties in the relation of landlord and tenant. Almost all feudal services have long been reduced to the nature of a pecuniary rent.

There are also other services which are due by ancient custom, such as suit to another's mill. Where the persons in a particular place have, time out of mind, ground their corn at an ancient mill, and any of them go to another mill, this is an injury to the owner of the ancient mill; because on the erection of such mill for the benefit of the former inhabitants, it may have been made a condition that they should all grind their corn there only. And for this injury, the owner has an action on the case for damages. (y) There were, anciently, writs of *secta ad furnum*, *secta ad torrale*, &c., for suits due to a furnace, or public oven or bakehouse, or to a torrale, a kiln, or malthouse; but these and similar services have long fallen into oblivion.

6. Disturbance.

The sixth and last species of injury to real property is that of *disturbance*; which is defined to be a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their lawful [*96] *enjoyment of it. Of this injury there are five kinds; viz., 1. Disturbance of *franchise*. 2. Disturbance of *common*. 3. Disturbance of *ways*. 4. Disturbance of *tenure*. 5. Disturbance of *patronage*.

1. Disturbance of *franchise* happens when a man has the franchise of keeping a fair or market, of taking toll, or, in short, any other species of franchise whatsoever; and he is incommoded in the lawful exercise thereof. For this injury he may recover damages by action *on the case*. (z) In the case of toll, he may take a distress.

2. The disturbance of *common* is where any act is done by which the right of another to his common is incommoded or diminished. This may happen where one, who has no right of common, puts his cattle on the

(x) A distress that has no bounds with regard to its quantity, and may be repeated from time to time, until the stubbornness of the party is conquered, is called a *distress infinite*. It may be used for some other purposes than for fealty; as in summoning jurors, and the like.

(y) *Coryton v. Lithbye*, 2 Wms. Saund., 112.

(z) *Mayor of Macclesfield v. Pedley*, 4 B. & Ad., 397.

common, or where one, who has a right of common, puts in cattle which are not commonable, as hogs and goats. Where the beasts of a stranger, or the uncommonable cattle of a commoner, are found upon the common, the lord or any of the commoners may distrain them damage-faisant; or the commoner may bring an action on the case for damages.

Disturbance of common may be also by *surcharging*, or putting more cattle therein than the pasture will sustain, or the party has a right to do.

The remedies for surcharging, which the lord has, are either by distraining, damage-faisant, so many of the beasts as are above the proper number, or by an action of trespass; an action on the case for damages may be brought by a commoner.

Disturbance of common may also be when any one incloses it, as by erecting fences, or drives the cattle off the land, or ploughs up the soil. For either injury the commoner may have an action on the case, though if the enclosure be by a wall or fence he may abate or throw it down. (a)

3. The disturbance of *ways* happens when a person, who has a right to a way over another's grounds by grant or prescription, is obstructed by enclosures or other obstacles. This injury generally amounts [*97] to that of *nuisance*, which has been already described.

4. Disturbance of *tenure* consists in breaking that connexion which subsists between the lord and his tenant. But this species of disturbance is now so little known, that the mere mention of it is sufficient.

5. The last species of disturbance, and by far the most important in its consequences, is that of disturbance of *patronage*; which is an hindrance or obstruction of a patron, in presenting his clerk to a benefice. This injury to the patron is remedied by one of the three real actions still existing, viz. *quare impedit*. The circumstances in which this action may be brought, and the proceedings thereon, do not, however, form part of the subject of this treatise. For the law on this subject, I therefore content myself with referring the reader to the authorities mentioned in the note; (b) and I now proceed to enumerate the private injuries which may affect the right to personal property.

CHAPTER IV.

INJURIES THAT AFFECT THE RIGHT TO PERSONAL PROPERTY.

Personal property consists of goods, furniture, plate, money, and generally all moveable chattels, as they are generally termed; which species of property is denominated personal, because it attends the owner's person wherever he goes, and is in all places at his disposal. Thus, I may give or sell in Calcutta the cattle on my farm in Yorkshire, or the goods in

(a) *Arlett v. Ellis*, 7 B. & C. 346.

(b) *Edwards v. Bishop of Exeter*, 5 Bing. N. C. 652; 6 Bing. N. C., 146. *Gorham v. Bishop of Exeter*, 15 Q. B. 52. *Robinson v. Marquis of Bristol*, 11 C. B., 208.

my warehouse in London. So I may sue my debtor in New York for the debt he contracted in Liverpool; and, though I may now effectually transfer at Calcutta an estate in Yorkshire, at common law I could only [*98] do so by livery of seisin on the real estate, i. e., *on the lands themselves. Personal property is legally termed *chattels*, in contradistinction to real property, and hence leases for terms of years, which are not real property, are, by a conjunction of these terms, denominated *chattels real*, the injuries to which have been considered in the former chapter as injuries to real property.

The term, personal property, again, includes not only things visible and moveable, it includes legal rights in respect of things personal; for as real property may be incorporeal—such as are rights of way, rent charges, or advowsons—so personal property may be incorporeal, and visible only to the law. That a debt, which is the legal right of the creditor to receive a sum of money from his debtor, is personal property, just as *patent rights* and *copy rights*, legal abstractions, so to speak, come within the same denomination.

From the very nature, therefore, of personal property arises the distinction which the law recognizes regarding it; viz., that it exists either *in possession*—that is, where the owner has not only the right to, but actual enjoyment of, the thing; or *in action*—that is, where the owner has the right to the property, but not the possession of it. Thus, a man has *in actual possession* his furniture, money, plate, and the cattle on his farm. So he may have this money, for instance, *in action*; for he may be the obligee in a bond for the amount, or the payee in a promissory note, given to him for his goods; in which case, though he has a right to the possession, though the *property* in the money vests in him the moment it is payable, still he has not the enjoyment of it—he has not the possession, till he has recovered it by an action. Hence, a debt is termed technically a chose in action; and on the same principle, the damages which a patentee ought to recover for any infringement of his exclusive privileges, is a chose in action; for though the right to, and property in, the damages vests in him the instant he has sustained the injury, there is no possession till these damages are recovered by an [*99] action. So the damages I may sustain from *an assault, or by a trespass on my lands, constitute a chose in action; a quality they do not lose, however, by the mere judgment of the Court in my favour. When a debt or damages have been awarded to a plaintiff by a judgment, the chose in action, it is true, changes its nature; it ceases to be a simple debt, or a simple claim for damages; it becomes a judgment-debt, and the lesser or weaker right merges, and is lost in the stronger or greater title given by the judgment, as I have pointed out already in speaking of retainer (a). Thus, I cannot sue a second time for a simple debt for which I have already recovered judgment. If I do, the defendant may effectually plead in bar of my suit, that judgment has been already recovered.

In personal property, again, one may have an absolute or a qualified

(a) Ante, p. 9.

possession. Thus, of the horses, sheep, and cattle on a farm, one may be absolute owner. Of the game on the estate, or the fish in the streams therein, the possession is only qualified. It subsists so long as they are within the bounds of the estate. The owner, therefore, may recover the value of the game or the fish, if taken on his property, as well as damages for the trespass. So if I intrust my goods to a carrier or an inn-keeper, each of them has a temporary or qualified possession of them, and either of them may maintain an action against any one doing them damage, in virtue of that possession, as I may in virtue of the legal ownership. (b) So a sheriff who has taken goods in execution may maintain *trover*, in virtue of his qualified possession, against any one removing them. (c)

1. *Injuries to Property in Possession.*

The owner of personal property in possession is liable to sustain two injuries: (*first*), the deprivation of possession; and (*secondly*), the damage of the chattels themselves, while the possession continues in *him. The deprivation of possession, again, may be by,—1. An *unlaw- [100]*
ful taking of the goods; or, 2. By an *unjust detaining* of them, though the original taking might have been lawful.

When a person has once gained a rightful possession of any chattels, either by a just occupancy or by a legal transfer, whoever, either by fraud or force, dispossesses him or them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. "For there must be an end of all social commerce between man and man, unless private possession be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions."

The wrongful taking of goods being thus an injury, the law has given two remedies for it. The first is the natural remedy, a restoration of the possession of which the owner has been deprived, by an immediate restoration of the goods, with damages for the loss the owner has sustained, by the unlawful invasion of his right of possession, which is effected by an action of replevin. The second remedy is the action of detinue, in which the plaintiff, if successful, obtains the restoration of the chattels by the judgment of the Court.

The invention of the action of replevin is ascribed to Glanvil, Chief Justice to King Henry the Second. It is chiefly resorted to in the case of a wrongful distress, but the action lies upon any unlawful taking whatever. (d)

(b) The law on this subject is collected in the notes to *Wilbraham v. Snow*, 2 Wms. Saund. 47 a. (c) *Giles v. Grover*, 9 Bing. 128.

(d) *Mellor v. Leather*, 22 L. J. R., 76 M. C.

This action, and that of detinue, it may be observed, are the only actions in which the specific possession of the identical chattels is restored to the owner; the law generally awards only to the plaintiff, whose right has been invaded, a pecuniary equivalent in the shape of damages.

In the case of a distress, it is to be observed, however, that the goods are, when taken, *in the custody of the law*, and not in that of [*101] the distrainer. The taking them back by force is, therefore, looked upon as a serious injury, and denominated a rescous,^(e) for which the distrainer has an action, either for the rescue itself, or for pound breach, if the goods were actually impounded.^(f)

The regular and proper way of contesting the validity of the first taking is, as I have said, by an action of replevin, which is a redelivery of the chattels taken or distrained, to the owner of them, upon his giving security to try the right of the taker or distrainer, and to restore the thing taken or distrained, if that right be adjudged against him.

As the law of distress is a subject of considerable importance, I have not taken it in its proper order; for distraining goods or cattle is, strictly speaking, an extrajudicial remedy given to the party injured.^(g) I have thought it therefore, more desirable to treat of it with immediate reference to the action of replevin, the proceedings in which differ somewhat from those in other actions, and may, perhaps, justify a separate consideration. I shall therefore now proceed to state, *first*, for what injuries a distress may be taken; *secondly*, what things may be distrained; *thirdly*, the manner of taking, disposing of, and avoiding distresses; and *fourthly*, the mode of contesting the right of the distrainer in the action of replevin.

I. A distress, *districcio*, is the taking of a personal chattel out of possession of the wrong-doer, into *the custody of the party injured*, [*102] to procure a satisfaction for the wrong committed; and it may be taken,—1. For neglecting to do suit to the lord's court,^(h) or other certain personal service, for which the lord may distrain, of common right; and, 2. For amercements in a court leet; but not for amercements in a court-baron, without a special prescription to warrant it; 3. A distress may be taken where one finds the beasts of a stranger in his grounds, damage-faisant, by treading down his grass, or the like. In this case the owner of the soil may distrain the beasts, till satisfaction be made him for the injury he has sustained; 4. For several rates, duties, and penalties conferred or inflicted by special Acts of Parliament (as for assessments made by commissioners of sewers, or for the relief of the poor), a remedy by distress and sale is given. Such distresses, however, resemble more the process of execution by *fieri facias*, under which the goods of the party against whom the writ is issued are seized and sold. But, 5. The most usual injury for which a distress may be taken is non-payment of rent; the detaining of which beyond the day when it is due is an injury to him that is entitled to receive it. The rent, it is to be observed, must be cer-

(e) The term *rescous* is likewise applied to the forcible delivery of a defendant when arrested from the officer carrying him to prison. In this case the plaintiff has a remedy by action on the case; or if the sheriff makes a return of such rescous to the court out of which the writ issued, the rescuer will be punished by attachment.

(f) The expense of these actions is so often out of proportion to the damage sustained, that persons releasing, or attempting to release, cattle impounded, or damaging any pound, have been made liable to be convicted thereof before two justices of the peace, and shall thereupon forfeit a sum not exceeding 5*l.* and expenses, and in default of payment be imprisoned for there calendar months (6 & 7 Vict., c. 30.)

(g) *Ante*, p. 4.

(h) *Ante*, p. 94.

tain, "for no distress can be taken for any services that are not put into "certainty, nor can be reduced to any certainty; for id certum est, quod "certum reddi potest." Therefore, if a tenant be let into possession under an *agreement* for a lease, the land lord cannot distrain; his remedy is an action for use and occupation.⁽ⁱ⁾ A tenancy such as will authorize a distress may, however, be implied from circumstances.^(k) And, again, where the amount is capable of being ascertained, certum reddi potest, as "by the number of cubic yards of marl and slack, got and of bricks made" on the land let, the landlord is entitled to distrain;^(l) and on the same principle, where premises were held for the services of "cleaning the *parish church," and of "ringing the church bell" at stated [*103] hours, these services were considered "rents," for which a distress might be taken.^(m)

II. As to the things which may be distrained, or taken in distress, it may be laid down as a general rule, that all chattels personal are liable to be distrained, unless particularly protected or exempted.⁽ⁿ⁾ Instead, therefore, of mentioning what things are distrainable, it will be easier to enumerate those which are not so, with the reason of their particular exemption.

1. Animals *feræ naturæ*, and other things wherein no valuable property is in any person, cannot be distrained. Yet deer kept in an inclosure for the purpose of sale or profit, are so far changed in their nature by being reduced to a kind of stock, that they may be distrained.

2. Things in the custody of the law, such as property already taken damage-faisant, or in execution cannot be distrained. These two descriptions of chattels are absolutely privileged at common law.

3. Things annexed to the freehold may not be distrained, such as chimney-pieces, windows, and doors; for they savour of the realty.^(o) For this reason also growing corn could not have been distrained, till the statute 11 Geo. II. c. 19, empowered landlords to do so.

4. Things delivered to a person exercising a public trade to be carried, wrought, or managed in the way of his trade, are privileged from distress. Thus, a horse standing in a smith's shop to be shod; cloth bailed to a tailor to make a garment; the goods of a principal in the hands of his factor; or goods on the premises of an auctioneer to be sold, cannot be distrained; for these are privileged for the benefit of trade, and are supposed not to belong to the owner of the premises, but to his customers. But, generally speaking, whatever chattels the landlord finds on the *premises, even those of a stranger, are distrainable; for otherwise a door would be open to infinite frauds upon the landlord; and [*104] the stranger has his own remedy by action on the case against the tenant, if by his default the chattels are distrained, so that he cannot render them when called upon. With regard to a stranger's beasts on the tenant's land the following distinctions are taken. If they be put in by con-

(i) 2 Wms. Saund. 285, n. (i).

(k) 1 Wms. Saund. 276 (a) et seq. (l) Daniel v. Gracie, 6 Q. B., 145.

(m) Doe d. Edney v. Benham; Doe d. Edney v. Billet, 7 Q. B., 978.

(n) The whole law on this subject is stated in the notes to Simpson v. Hartoff.

1 Smith's, L. C., 191.

(o) Darley v. Harris, 1 Q. B., 895, and see all the cases in Hellowell v. Eastwood, 6 Ex. 1295.

sent of their owner, they are distrainable immediately afterwards for rent-arrear by the landlord. So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts; for the wrong committed through his negligence. But if the lands were not sufficiently fenced, the landlord cannot distrain them, till they have been levant and couchant on the land, which is held to be one night at least; and then the law presumes that the owner may have notice, whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences, and did not, and thereby the cattle escaped into their grounds without default in the owner, in this case, they are not distrainable for rent, till actual notice is given to the owner that they are there, and he neglects to remove them; for the law will not suffer the landlord to take advantage of his own or his tenant's wrong. (*p*)

5. As nothing shall be distrained for rent, which may not be rendered again in as good plight as when distrained, milk, fruit dead meat, (*q*) and the like, cannot be distrained. So, generally, cocks and sheaves of corn could not be distrained, because some damage must needs have accrued in their removal; but a cart loaded with corn might, as that could be safely restored. But now, by stat. 2 W. & M. c. 5, cocks of corn or loose corn and hay may be distrained, and secured where found, until replevied, but must not be removed.

*6. Things in actual use, as an axe with which a man is cutting [**105*] wood, or a horse on which he is riding, are privileged, in order to prevent any breach of the peace, which might be occasioned by an attempt to distrain them.

These four sorts of property are also absolutely privileged, but there are two other species of property, *conditionally* privileged, provided that there be other sufficient distress on the premises. Thus, —

7. A man's tools and utensils of his trade, if in actual use; the axe of a carpenter, the books of a scholar, and the like, are privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. (*r*) So, —

8. Beasts of the plough, and instruments of husbandry, are privileged; (*s*) but beasts of the plough may be taken in execution for *debt*, so they may be for distresses by statute, which, as I have stated, partake of the nature of executions.

Formerly distresses were looked upon as a mere pledge or security for payment of rent, or other services, or satisfaction for damage done. And such is the law as to distresses of cattle taken damage-faisant, and for other causes, not altered by Act of Parliament. Over these the distrainer has no power but to retain them till satisfaction is made. But

(*p*) *Piggot v. Birtles*, 1 M. & W. 441.

(*q*) *Morley v. Pincombe*, 2 Ex. 101.

(*r*) The true reason why beasts of the plough and the tools of a man's trade (says Blackstone) were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its non-payment; and therefore to deprive the party of the instruments and means of paying it would counteract the very end of the distress.

(*s*) *Piggot v. Birtles*, 1 M. & W., 441.

distresses for rent-arrear having been found the most effectual method of compelling the payment of such rent, several statutes have materially altered the common law relating to them.

Suppose, then, the distress to be made for rent, it must be made *by day*. A distress, *damage-faisant*, may be made at any time, a necessary exception to the rule, lest the beasts should escape before being [*106] **taken*. A person intending to make a distress must, by himself or his bailiff, enter on the demised premises, formerly doing the continuance of the lease, but now, by stat. 8 Ann. c. 14, if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title, as well as the tenant's possession, continue at the time of the distress. If the lessor does not there find sufficient distress, formerly he could resort nowhere else; and therefore tenants often made a practice to convey away their goods from the premises, in order to cheat their landlords. But now the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them in thirty days after, unless they have been bona fide sold for a valuable consideration; (t) and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may not break open a house (u) to make a distress, for that is a breach of the peace; but when in the house he may break open an inner door, or lift up his own floor, in order to distrain in the room below. (v) By the assistance of the peace-officer of the parish, he may, however, break open in the day-time any place whither the tenant's goods have been fraudulently removed and locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Distresses must be proportioned to the thing distrained for. By the stat. of Marlbridge (52 Hen. III., c. 4), any one taking a great or unreasonable distress for rent-arrear shall be heavily amerced. As if the landlord distrains two oxen for twelvepence rent; the taking of *both* is an unreasonable distress; but if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them. [*107] So if there be only one chattel to distrain, **the distress, will* not be unreasonable. (w) A distress for 39*l.* of a rick of wheat of the value of 62*l.* is not excessive. (x) For homage, fealty, or suit and service, no distress can be excessive, (y) for as these distresses (being at common law) cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for an excessive distress is by an action on the case on the stat. of Marlbridge; for trespass is not maintainable, it being no injury at common law.

"When the distress is taken, the next consideration is the disposal of *it*. For which purpose the things distrained must, in the first place, *be* carried to some pound, and there impounded by the taker. But, *in* their way thither, they may be rescued by the owner, in case the

(t) Williams v. Roberts, 7 Ex., 618.

(u) Ryan v. Shilcock, 7 Ex., 72.

(v) Gould v. Bradstock, 4 Taunt. 562.

(w) Field v. Mitchell, 6 Esp. 71; Avenell v. Croker, M. & Mal. 172.

(x) 1 Roden v. Eyton, 6 C. B., 427.

(y) Ante, p. 95.

"distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; and in these cases the tenant may lawfully make rescue. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law."

A pound is either pound-*overt*, that is, open overhead; or pound *covert*, that is close. By stat. 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound-*overt* within the same shire, and within three miles; or be impounded in several places. This is for the benefit of the tenants, that they may know where to replevy. And by stat. 11 Geo. II., c. 19, any person distraining for rent may turn the premises upon which a distress is taken into a pound, *pro hac vice*, for securing such distress.(z) A distress of live animals must be impounded in a pound proper to receive them without injury, otherwise the distrainer *will be liable;(a) and the [*108] impounder is now bound to feed and sustain the cattle.(b) A distress of household goods, which are liable to be stolen or damaged, ought to be impounded in a pound-*covert*, else the distrainer must answer for the consequences.

Chattels, when impounded, were formerly only a pledge or security to compel satisfaction; and upon this account the distrainer is not at liberty to work a distressed beast, though milch kine may be milched. And this is the law with regard to cattle taken *damage-faisant*, and other common-law distresses; which must remain impounded till the owner makes satisfaction, or contests the right of distraining, by replevying the chattels. To *replevy*, or take back the pledge is, when the owner of the chattels, on application to the sheriff, has the distress returned to him, on his giving good security to try the right of taking it in an action; and if that be determined against him, to return the chattels to the distrainer. It thus answers the same end to the distrainer as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

A distress at common law, though it put the owner to inconvenience, if he continued obstinate, was thus no remedy to the distrainer. But for a debt due to the crown, unless paid within forty days, a distress is saleable at common law. In the several statutory distresses also, before referred to, which are in the nature of executions, power of sale is usually given to complete the remedy. Finally, by several statutes, in all cases of distress for rent, if the owner do not within five days after the distress is taken, and written notice(c) of the cause thereof given him,(d) to which at common law he has no right,(e) replevy the same with sufficient security, the distrainer, with the sheriff or constable, shall [*109] cause the same to be appraised by *two sworn appraisers, and sell the same towards satisfaction of the rent and charges, at the best

(z) And may justify taking precautionary measures to make it secure, *Woods v. Durrant*, 16 M. & W., 149. (a) *Wilder v. Speer*, 8 Ad. & El., 547.

(b) 12 and 13 Vict., c. 92, ss. 5 & 6. (c) *Wilson v. Nightingale*, 8 Q. B. 1034.

(d) *Kerby v. Harding*, 6 Ex., 234. (e) *Tancred v. Leyland*, 18 Q. B., 666.

price,(f) leaving the overplus, if any after the sale, with the sheriff;(g) by which means a full satisfaction may now be had for rent in arrear, and by the mere act of the party himself,(h) viz., by distress (the remedy given at common law), and the sale consequent thereon, added by act of parliament.(i)

IV. Formerly when the party distrained upon intended to dispute the right of the distrainor, he was obliged to sue out an original writ(k) of *replegiari facias*; which commanded the sheriff to deliver the distress to the owner, and afterwards to decide the right in his county court. But the statute of Marlbridge directed the sheriff, immediately on plaint made to him, without writ to replevy the goods. And the stat. 1 P. & M. c. 12, further provided that he should appoint four deputies in each county for this sole purpose. On application, therefore, to the sheriff or one of his deputies, security is to be given, in pursuance of the stat. of Westm. 2. 1. That the party replevying will pursue his action against the distrainor, for which purpose he puts in plegios de *prosequendo*; and, 2. That if the right be determined against him, he will return the distress again; for which purpose he must also find plegios de *retorno habendo*. Besides these pledges, which, however, are not in practice taken in replevying a distress for rent, the stat. 11 Geo. II., c. 19, requires that the sheriff granting a replevin, on a distress for rent, shall take *a bond with two sureties in a sum of double the value of [*110] the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods. This bond may be assigned to the avowant or person making cognizance(i. e., the distrainor); and, if forfeited, may be sued upon, in the name of the assignee. The sheriff, on receiving, such security, is immediately by his officers, to restore the chattels taken in distress to the owner.(l)

(f) *Ridgeway v. Lord Stafford*, 6 Ex., 404.

(g) *Yates v. Eastwood*, 6 Ex., 805.

(h) *Ante*, p. 4.

(i) The many particulars which attend the taking of a distress, formerly made it a very hazardous proceeding; for if any irregularity was committed it made the distrainers trespassers *ab initio*. Now, however, by stat. 11 Geo. II., c. 19, for any unlawful act done, the parties shall not be trespassers *ab initio*; but the party grieved shall have an action for the damage sustained; and not even that, if tender of amends is made before action brought.—*Six Carpenters' Case*, 1 Smith's L. C., 66.

(*) See post, Part III., chap. i.

(l) But not if the distrainor claims a property in the goods, for if the distrainor happens to come again in this way into possession of his own property, the law allows him to keep them; this being a kind of personal remitter. If the distrainor therefore claims such property, the party replevying must sue out a writ de *propriate probanda*, on which the sheriff is to try by an inquest, in whom was the property previous to the distress; which, if found to be in the distrainor, the sheriff can proceed no farther, but must return the claim of property to the Court of Queen's Bench or Common Pleas to be there prosecuted. If the sheriff's inquest determine the right of property against the distrainor, the sheriff is to replevy (making use of the *posse comitatus*, if necessary,) if the goods be found in his county. But if the distress have been carried out of the county, the sheriff may return that the goods are *eloigned*, *elongata*, carried to a distance, to places to him unknown: and thereupon the party replevying shall have a writ of *capias in withernam* (in *vetito*, or more properly, *reposito namio*, a term which signifies a second or reciprocal distress, in lieu of the first which was *eloigned*,) which is a command to the sheriff to take goods of the distrainor himself, in lieu of the distress taken by him and withheld from the owner. So that here is now distress

This action, in the case of distresses for rent or damage-faisant, is now prosecuted in the new County Courts,^(m) where it is begun by a plaintiff, and followed out as in other actions. It would be out of place here, to describe the nature of the proceedings of the County Court, the more especially as these actions of replevin are, if of any consequence, invariably removed by a writ of certiorari into one of the superior courts.

The writ of certiorari, which had been formerly mentioned,⁽ⁿ⁾ issues [*111] out of the Court of Chancery or *either of the superior courts of common law. It is directed to the judge of an inferior court of record and commands him to return the record of the cause therein named then depending in his court, to the end that the party suing out the writ may have more speedy justice. In criminal cases, the writ issues from the Queen's Bench.^(o)

The proceedings in replevin, in the County Court, may be removed by either party satisfying a judge of one of the superior courts, that in the action in the court below, the *title* to real property will come in question; or that the rent or damage in respect of which the distress was taken exceeds 20*l.*, and becoming bound, at the same time, with two sureties to prosecute the suit without delay, and to prove either that such title was in question, or that there was ground for believing the rent or damage to exceed 20*l.* This application is necessarily *ex parte*; it is made generally to a judge at chambers, and is founded on an affidavit of the facts. If the judge makes an order allowing it to issue, the writ is prepared by the party, and sealed at the office of the court. On being delivered to the judge of the county court, it at once stops all proceedings before him.

On the removal of the action into the superior court, out of which the writ issued, which is completed when the judge of the county court has returned the writ with the proceedings in replevin, a declaration which we shall see afterwards, is the plaintiff's statement of his cause of action, is delivered, to which the distrainer, who is now the defendant, must plead in the same way as in other actions. His pleas, however, have peculiar technical names, for he either makes *avowry*; that is, he *avows* taking the distress, and sets forth the reason of it, as for rent in arrear, or damage done by the cattle taken; or else he justifies in another's right as his bailiff or servant, in which he is said to make *cognizance*; that is, [*112] he *acknowledges* the taking, *but insists that such taking was legal, as he acted by the command of one who had a right to distrain.

The defendant may also plead the general issue, *non cepit*; that is, "that he did not take the goods." Several pleas, *avowries*, or *cognizances* may be pleaded together by leave of the court or a judge.^(p)

The plaintiff's next pleading is properly the pleading in bar in replevin against distress; one being taken to answer the other by way of reprisal, for which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming.

^(m) 9 & 10 Vict. c., 95, ss. 119, 120, 121.

⁽ⁿ⁾ Ante, p. 26.

^(o) Ante, p. 26.

^(p) Com. Law Proc. Act, 1852, s. 86.

vin; for it will be observed that on the defendant is thrown the burden of making out his right to take the distress. The defendant, indeed, in replevin occupies the place of plaintiff in an ordinary action; he it is who seeks to recover the distress or its value; and the plaintiff, on the other hand denies or resists that right, just as a defendant would do in an ordinary action, and this distinctive feature in replevin it is desirable to recollect, for in the enactments of the Common Law Procedure Act, and other statutes, and in the Rules of the Courts, "the plaintiff or defendant in replevin," and "defendant or plaintiff in replevin," are always classed together—a combination leading to embarrassment, unless the peculiar relative position of the parties in this particular action is borne in mind.

The plaintiff then, on the plea of non cepit, joins issue, or else traverses the facts alleged in, or demurs to the law arising from, the avowries or cognizances. At present, however, it is impossible to enter at length into what pleas or replications the parties may respectively put on record. I must content myself with adding, that a record is made up, and the issues in fact, tried before a jury; or the issues in law, raised, by demurrer, determined by the courts as in ordinary actions.

On the truth or legal merits of the pleas, avowries, or cognizances, the cause is necessarily determined. If determined for the plaintiff, viz., that the distress was wrongfully taken, he has already got back his goods, and he shall now keep them, and recover damages for the unlawful taking and detainer.

If the defendant succeeds in maintaining his right *to distress, he shall have either a judgment for a return of the distress [*113] (enforced by writ de retorno habendo, which may then be sold, or otherwise disposed of, as if no replevin had been made; or if the distress was for rent, a judgment for the amount of rent in arrear.(g)

The owner of chattels, who has been dispossessed of them by an unlawful taking, has however two other remedies, besides the right to have them re-delivered to him, on giving security to prosecute an action of replevin. For if one take the goods of another out of his actual or virtual possession, without lawful title to do so, it is an injury; which, if done animo furandi, is a felony; but is in any case an injury for which an action of trespass will lie, provided the taking were vi et armis, that is, by duress;(r) while, if the injury be committed without force, the owner may have another remedy by action of trover;(s) and he may waive the hurt or injury committed to him by the trespass, and treat the injury as

(g) At the Common Law the plaintiff might have brought another replevin, and so on, ad infinitum, till the stat. of Westm. 2 restrained the plaintiff, when nonsuited, from suing out any fresh replevin; but allowed him a writ of second deliverance, to have the distress again delivered to him, on giving security as before. If the plaintiff is a second time nonsuited, or the defendant had judgment on verdict or demurrer in the first replevin, he has a writ of return irreplevisable; after which no writ of second deliverance is allowed. In case of distress for rent, the writ of second deliverance is practically taken away by stat. 17 Car. II., c. 7, for if the verdict be against the plaintiff, the jury may assess the arrears for the defendant and if the distress was insufficient to answer these arrears, the defendant may take a farther distress. (r) Powell v. Holyland, 6 Ex., 67.

(s) Dennis v. Danks, 3 Ex., 437.

of wrongful detention only, by suing in trover. In both of these actions he can only recover damages to the extent of the value of the goods.

Originally this action of *trover*, or *trover* and *conversion*, which is however the usual remedy adopted, was an action of trespass on the case, for [*114] recovery of damages against the person who had *found* another's goods, and refused to deliver them on *demand, but *converted* them to his own use; from which finding and converting it is called an action of *trover* and *conversion*. This action was free from the ancient absurdity called *wager of law*,^(t) and less certainty was required in describing the goods taken or found, than was necessary in the action of detinue about to be mentioned. The usual result followed, that plaintiffs adopted, with the permission of the judges, a form of action more suited to the common sense of mankind, than the other more technical remedy open to them; and, by a fiction of law, actions of trover were permitted to be brought against any one, who had in his possession by any means whatever, the goods of another, and who sold them or used them without the owner's consent, or refused to deliver them up when demanded. The injury lies in the conversion :^(u) for any man may take the goods of another into his possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be unknown, and therefore he must not convert them to his own use, which the law presumes him to do, if he refuse to restore them to the owner; for which reason such refusal alone is, *prima facie*, evidence of a conversion. The fact of the finding, or trover, is therefore now totally immaterial. It was necessary, till the Common Law Procedure Act, 1852, simplified the forms of pleadings, for a plaintiff to allege in his declaration, that he had *lost* the goods, and that the defendant had *found* them, and then to aver a *conversion* by the defendant to his own use; but these fictions need not now be stated. It is enough to say, that the defendant wrongfully converted the goods to his own use,^(v) that is, did so *intentionally*,^(w) or wrongfully deprived the plaintiff of the use and possession of them; for if he proves that the goods are *his* property, and that [*115] the defendant had them in his possession, it is *sufficient. Thus when a chattel is lent, and it is mis-used or destroyed, there is at once an end of the loan, and trover may be maintained against the borrower,^(x) which action may be maintained against a purchaser from a bailee for hire.^(y) So trover may be maintained against a sheriff who seizes goods in the actual possession of a bailee, but whose right of possession has ceased.^(z)

In trover the plaintiff recovers damages equal to the value of the chattels converted, but not the chattels themselves, which can be recovered only in replevin, or in action of detinue.

A deprivation of possession may also take place by the unjust *detainer*

(t) Black. Com. vol. iii., ch. ix.

(u) *Fouldes v. Willoughby*, 8 M. & W., 540; *Rushworth v. Taylor*, 3 Q. B., 699.

(v) Com. Law Proc. Act, 1832, Sched. B, 28.

(w) *Powell v. Holyland*, 6 Ex., 67. (x) *Bryant v. Wardell*, 2 Ex., 482.

(y) *Cooper v. Willomat*, 1 C. B. 672; *Fenn v. Bittlestone*, 7 Ex., 152.

(z) *Manders v. Williams*, 4 Ex., 339.

of another's chattels, though the original *taking* was lawful. If I detain another's cattle *damage-faisant*, and before they are impounded so as to be in the custody of the law, he tenders me amends, though the original taking was lawful, my subsequent detainer after tender of sufficient amends is wrongful, and the owner may maintain replevin, in which he shall recover damages for the *detention* only, and not for the *caption*, the original taking having been lawful. So, if I lend a man a horse, or a chattel of any kind, and he afterwards refuses to restore it, the injury to me is the *detaining* the chattel, and the regular method to recover possession is by an action of detinue, (a) which may be brought, although the chattel has been improperly parted with by the borrower. (b) In detinue it is necessary to ascertain the thing detained, so that it may be specifically recovered. (c) It cannot be brought therefore for money, corn, or the like, unless it be in a bag or a sack, for then it may be distinguished. (d) The jury on the trial in this action, if they find for the plaintiff, assess the value of the chattels detained, and also *the [*116] damages which the plaintiff has sustained by the detention. The judgment is conditional; that the plaintiff recover the chattels, or the sum assessed as the value if he cannot have them again, and also his damages and costs. (e)

If the jury find that a redelivery of the chattels is impossible, they may assess the damages only. So if the chattels have been redelivered to the owner after action, they need only assess the damages for the detention. (f)

As to damage that may be done to personal property while in the possession of the owner, these are injuries too obvious to need explanation. The remedy is by action of *trespass*, where the act is *immediately* injurious, and therefore necessarily accompanied with some degree of force; or by action on *the case*, where the injury is only *consequential*. In both actions the plaintiff recovers damages in proportion to the injury sustained. And, as I have pointed out already, (g) it is not material whether the damage be done by the defendant or by his servants by his direction.

2. Injuries to Personal Property in Action.

I now come to consider those injuries which regard things in *action* only; or such rights as are founded on, and arise from *contracts*.

Contracts are either *express* or *implied*, and the former are three in number;—debts, covenants, and promises.

1. The legal acceptance of *debt* is, a sum of money due by certain and express agreement; as, by a bond, a bill or note, a special bargain, (h) or a specific rent reserved on a lease. The non-payment of these is an injury, for which the proper remedy is by action of *debt*, to recover

(a) Com. Law Proc. Act, 1852, S. 59, Sched. B, 29.

(b) Jones v. Dowle, 9 M. & W., 19.

(c) Graham v. Gracie, 13 Q. B., 552.

(d) Ibid.

(e) Phillips v. Jones, 15 Q. B., 859.

(f) Williams v. Archer, 5 C. B., 318.

(g) Ante, p. 58.

(h) Stone v. Rogers, 2 M. & W., 448.

the specific sum due. So, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the *performance, an [*117] action of debt lies against me. Formerly, however, if the purchaser had agreed for no settled price, he was not held liable to an action of debt, but to a special action *on the case*, according to the nature of the contract. And in *debt* the plaintiff must have proved the whole debt he claimed, or recover nothing at all. For the debt was considered one single cause of action; and if the proof varied from the claim, was not looked upon as the same contract whereof the performance was sued for. "If, therefore, I brought an action of debt for 30*l.*, I was not at liberty "to prove a debt of 20*l.*, and recover a verdict thereon; any more than "if I brought an action of detinue for a horse, I could thereby recover an ox." It has long been settled, however, that the plaintiff in debt may recover a less sum than is demanded; but the ancient difficulties in the way of the plaintiff which I have mentioned gave rise to the action of *assumpsit*, which is, as I have stated, an action on the case, brought not to compel a specific payment of a debt or penalty, but to recover damages for non-performance of the implied promise to perform, which the law raises whenever there is a duty to be performed. For if *any* debt in an action of *assumpsit* be proved to exist, the law will raise a promise *pro tanto*, and the damages recovered in the action will be proportioned to this actual debt.

One effect of the Common Law Procedure Act, 1852, has been to do away with any apparent difference between the actions of debt and *assumpsit*. But one important distinction still exists in this, that debt only lies where there is a *privity* of contract. Thus *assumpsit* will lie by the indorsee against the acceptor of a bill of exchange, debt will not, there being no *privity*. But the indorsee may sue the indorser either in debt or *assumpsit*; for where debt will lie, *assumpsit* will lie, although the converse, it will be observed, is not the case, for there is always an implied promise where there is a legal liability; although, be it recollected, where the legal liability is created by a deed under seal, there [*118] the implied *promise is swallowed up and lost in the more solemn promise or covenant: on that covenant again debt will lie, though *assumpsit* will not.

And here I ought to state, that on this portion of my subject I must be more general even than I have been in other instances. Contracts, their nature and incidents, are the subject of by far the greater portion of the litigation that takes place in our courts; and any attempt to enumerate, even, not to explain, the variety of rights and interests therefrom arising, would occupy a volume much larger than the present. I must, therefore, content myself with merely stating the different denominations of contracts, leaving it to my readers to resort for more full information to treatises on this special subject. (†)

The action of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only. These are the technical terms which were

(†) I know of no better treatise than "Smith on Contracts," edited by J. C. Symonds, Esq., or "The Principles of the Law of Personal Property," by Joshua Williams, Esq.

used in the original writ, by which this action in common with all others was formerly commenced. The action is in the debt as well as detinet, when brought by one of the original contracting parties, who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor in a bond, the landlord against the tenant on a covenant in the lease, &c. But if it be brought by or against an executor for a debt due to or from the testator, this, not being his own debt, is sued for in the detinet only. But since the recent changes, these distinctions are of no practical value.

A covenant also, contained in a deed, to do a direct act or to omit one, is an express contract, the breach of which is a civil injury.

Thus if one covenants to pay money (rent for instance) on a particular day, the non-payment of it is an injury, for which in this particular case the plaintiff may sue, either in an action of debt to recover the money itself, or in an action of covenant *to recover damages for the breach of the covenant, which damages are the amount of the [*119] money due and the interest thereof since it became payable. So if one covenants to keep a house in repair, or to cultivate land in a particular manner, a cultivation in another manner in the one case, or allowing the house to become ruinous in the other, are breaches of covenant, for which damages equal to the injury thereby sustained may be recovered. So one may covenant for further assurance, that is, to make a good title to property, or for quiet enjoyment, that is, that a tenant shall not be disturbed in his possession, and these covenants are all enforced in the same way by action of *covenant*. But if the covenants are unreasonable, or in restraint of trade, the law will not enforce them. (k)

It will be observed, that the remedy for breach of covenant is by an action to recover damages for the injury thereby sustained. But it often happens that this is by no means an adequate remedy. And hence it is that the parties in whose favour covenants are made, are often compelled to resort to a Court of Equity, which in many cases will decree and compel the specific performance of the covenant itself, instead of allowing the party to escape performance altogether, by forfeiting such a penalty as a jury may impose on him in an action. This power to compel specific performance, the Common Law Commissioners have recommended (Second Report, 1853) should be conferred on the Superior Courts of Common Law, so that ere long, should the Legislature adopt the recommendation, a plaintiff will have his choice of either remedy in these courts.

"A promise is in the nature of a verbal covenant, and wants nothing but a good legal consideration, and the solemnity of writing and sealing, to make it absolutely the same." The remedy is not the same, however; for the plaintiff has only an action on the case, founded on what is called the assumption or undertaking of the defendant; the failure to perform which is the injury done, of which the jury are to estimate the damages. Thus in the case of a debt by simple con- [*120]

(k) *Mitchell v. Reynolds*, 1 Smith's, L. C., 171.

tract, as for goods sold by a tradesman, if the debtor specially promises to pay it and does not, this breach of promise strictly entitles the creditor to his action on the case, instead of the formerly objectionable action of debt; but the creditor now sues in such a case on the promise, which the law implies the debtor to have made, to pay the price of the goods when they were sold to him, and treats the special promise as an account stated between him and the creditor. A promissory note, to pay money at a day certain, is an express assumpsit, and the payee or indorsee may recover the value of the note in damages in an action of assumpsit, if it remains unpaid.

And this is the proper place to mention, that there are certain agreements, which though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory of witnesses. To prevent which, the Statute of Frauds and Perjuries enacts, that no action^(l) shall be brought (1.) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate;^(m) or (2.) whereby to charge the defendant to answer for the debt, default, or miscarriage of another;⁽ⁿ⁾ or (3.) to charge any person upon any agreement made, upon consideration of marriage;^(o) or (4.) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning of them; or (5.) upon any agreement that is not to be performed within a year from the making thereof,^(p) unless the agreement upon which such action shall be brought, or some memorandum or note thereof [*121] shall be *in writing*, and signed by the party to be charged therewith, or some other *person thereunto by him lawfully authorised. And the statute extends to the case of contracts made abroad, *where writing is not required.*^(q) This statute is extended by the 9th Geo. IV., c. 14, which enacts that no action shall be maintained (6), whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith; and (7.) that no action shall be brought, whereby to charge any person upon or by reason of any representation or assurance, made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith.^(r)

(l) Or suit in equity, *Cooth v. Jackson*, 6 Ves. 31.

(m) *Philpot v. Bryant*, 4 Bing., 717. (n) *Matsom v. Wharum*, 2 T. R., 80.

(o) *De Beil v. Thomson*, 12 Cl. F., 45. (p) 1 Smith's, L. C., 143.

(q) *Leroux v. Brown*, 22 L. J. R. 1 C. B.—Weekly Rep. 1852-3, 22.

(r) There is no statute which has given rise to so much litigation as the Statute of Frauds. A volume would scarcely contain a proper report of the leading cases. The reader will find them all collected in several works, and nowhere better than in the "Treatise on the Law of Contracts not under Seal," by Mr. Chitty; the later editions of which are most ably edited by J. A. Russell, Esq. In Chitty's "Collection of Statutes," edited by Edward Beavan, Esq., the numerous decisions

"From *express* contracts the transition is easy to those that are only *implied* by law; which are such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform; and upon this presumption, makes him answerable to such persons as suffer by his non-performance."

Of this nature are such as are necessarily implied by the fundamental constitution of our government, to which by the law of society every man is considered a contracting party. Thus every person is bound to pay such particular sums of money, as are *charged on him by the sentence of the law. For it is a part of the original contract, [*122] entered into by all who partake of the benefits of society, to submit in all points to the local ordinances of that State of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he has by this original contract promised to discharge. And on the same principle of an implied original contract to submit to the rules of the community, a forfeiture imposed by the private ordinances of a corporation, immediately creates a debt in the eye of the law, recoverable by action. "And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money, as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he has once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant has contracted a debt, and is bound to pay it." But actions of debt on judgments are discountenanced by the courts, as vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one. And the legislature has interfered by enacting (43 Geo. III., c. 46, s. 4,) that in actions on judgments the plaintiff shall not be entitled to any costs of suit, unless the court shall otherwise order. On judgments of the County Court, an action of debt will not lie. (s)

*From the fundamental contract of society also arises the obligation incumbent on every member of the community, to obey [*123] directions of the legislature, or pay the forfeiture incurred by disobedience, to such persons as the law requires. These forfeitures, are created by what are hence generally termed *penal* statutes. Thus an action may be brought against a sheriff, for the penalty imposed on him for ex-

on these most important statutes are likewise carefully collected and systematically arranged.

(s) *Berkeley v. Elderkin*, Weekly Reporter, 1852-53, 305; 22 L. J. R.; 281 Q. B. The legislature has conferred on the County Courts some special means (though they have been hitherto ineffectual) of compelling performance of its judgments; but the ground, on which it is held that an action will not lie, would seem to be, that the judge of the County Court may at any time alter the previous judgment; so that the plaintiff might be suing on it in the superior court, while the County Court judge was altering it in the court below.

FEBRUARY, 1854.—7

tortion, in levying greater fees than the law allows him; (t) or against any one taking usurious interest; (u) or against a stockbroker for acting without having been admitted by the Lord Mayor and Aldermen of London; (v) or against any member of Parliament for voting without having taken the oaths of abjuration. (w) The penalties are generally given to any common informer; or in other words, to any person who will sue for the same. Such actions are hence called *popular* actions, because they are given to the people in general. Sometimes part is given to the crown or to the poor, and the other part to the informer; and the action is then called a *qui tam* action, because it is brought by a person who, in the words of the ancient writ, "*qui tam pro domino rege, etc., quam pro se ipso in hac parte sequitur.*" If the crown commences this suit, the whole forfeiture belongs to it. But if any one has once begun a *qui tam* action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even on the crown, unless the verdict have been obtained by collusion. (x)

"A second class of implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law. Which [*124] "class extends to all presumptive *undertakings or assumpsits; "which, though never perhaps actually made, yet constantly arise "from this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice "requires."

If I employ a person to perform any work, or to use his skill for me, the law implies that I undertake to pay him so much as his labour or skill deserves. (y) And if I fail to do so, his remedy is by an action of assumpsit on this implied promise. The plaintiff therein claims what sum he pleases to name as the value of his labour or skill; but this valuation is submitted to the determination of a jury, who give such a sum in damages for the breach of the promise or undertaking of the defendant, as they think the labour or skill of the plaintiff was worth. An action of this nature is termed an assumpsit on a *quantum meruit*. If after work has been done, and materials provided by the plaintiff, the defendant refuses the articles made for him, the remedy is by an action for not accepting the goods, the assumpsit on a *quantum meruit* will not lie in this case. (z)

There is also an implied assumpsit on a *quantum valebat*, which is very similar to the former, being where one purchases goods without expressly agreeing for the price; in which case the law concludes that the purchaser intentionally agreed that the real value of the goods should be paid by him. And this action is either for "goods bargained and sold by the plaintiff to the defendant;" or for "goods sold and delivered by the plaintiff to the defendant."

The action for goods "bargained and sold" lies where the property in

(t) 28 Eliz., c. 4.

(u) 12 Anne, st. 2, c. 16.

(v) Clark v. Powell, 4 B. & Ad., 846.

(w) Miller v. Salomons, 7 Ex., 475.

(x) Stat. 4 Hen. VII., c. 20.

(y) Grafton v. Armitage, 1 C. B., 336.

(z) Atkinson v. Bell, 8 B. & C., 277.

the goods has passed to the defendant, though there has been no actual delivery to him,^(a) nor any *actual* acceptance by him,^(b) provided there be sufficient constructive acceptance, a giving of earnest, a partial payment, or a written *memorandum as required by the Statute of Frauds;^(c) which provides that no contract for the sale of any [*125] goods, wares, and merchandizes for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same,^(d) or give something in earnest to bind the bargain, or in part of payment;^(e) or that some note or memorandum in writing of the said bargain^(f) be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.^(g) And this enactment is, by 9 Geo. IV., c. 14, extended to all contracts for the sale of goods of the value of 10*l.* sterling, or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made or provided, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

The action for goods "sold and delivered" lies when the goods have been actually delivered, or the seller has put in the purchaser's power to take them,^(h) or if sold on "sale or return," where the purchaser has not returned them within a reasonable time.⁽ⁱ⁾

A third species of implied assumpsit is when one has received the money of another, without any consideration given on the receiver's part; for the law construes this to be money received for the use of the owner, and implies that the person so receiving it undertook to account to the owner for it. If he detains it, an action accordingly lies against him for the breach of such implied promise, in which the damages given will be equivalent to what the defendant has *detained in violation of [*126] such his implied promise. This is a very extensive remedy, applicable to almost every case where the defendant has received money which in justice and equity he ought to refund. It lies for money paid by mistake, or on a consideration which has failed, or where any advantage has been taken of the plaintiff's situation; and the cases on the subject are therefore exceedingly numerous—an observation which will apply to the action of assumpsit "for money paid by the plaintiff for the defendant at his request," which lies where one has expended his own money for the use of another, at his request, in which circumstances the law implies a promise of repayment by the person for whom, or for whose benefit the money has been laid out.^(k)

(a) *Atkinson v. Bell*, 8 B. & C. 277.

(b) *Saunders v. Topp*, 4 Ex., 390.

(c) 29 Car. II., c. 3, s. 17.

(d) *Bill v. Bament*, 9 M. & W., 36; *Saunders v. Topp*, 4 Ex., 390.

(e) *Walker v. Nursey*, 16 M. & W. 302; *Elliott v. Pybus*, 10 Bing., 512.

(f) *Duke v. Andrews*, 2 Ex., 290; *Johnson v. Dodson*, 2 M. & W., 653.

(g) *Graham v. Musson*, 5 Bing., N. C., 607; *Goom v. Afalo*, 6 B. & C., 117.

(h) *Smith v. Chance*, 2 B. & Ald., 755.

(i) *Moss v. Sweet*, 16 Q. B., 493.

(k) To enter into any detail or explanation of the circumstances in which the action for "money received," or for "money paid," for the use of the defendant, lies, would be to write a treatise almost on simple contracts. As already stated, I can, in this case, only refer my readers to those works which are devoted to the

Upon a stated account between two persons, the law implies that he against whom the balance appears, engaged to pay it to the other, though there has not been any actual promise. "And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *in simul computassent* (which gives name to this species of *assumpsit*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it."⁽ⁿ⁾ In the action on an account stated, the plaintiff sues for "money found to be due from the defendant to the plaintiff on accounts stated between them;" and in all actions in which there have been accountings, as for goods sold, or on bills or notes, it is allowed, and indeed usual, to insert a count on "accounts stated;" for there is often evidence of a statement of accounts, when there is not sufficient evidence to enable the plaintiff to recover on the other counts of the declaration. In order to constitute an "account stated," there must be a statement of some certain amount of money being due, which must be made either to the party himself or to some agent of his;^(o) and an admission of a sum being due will be evidence to go to a jury.^(p) But an award is not evidence of an account stated, for the arbitrator is not the agent of either party to settle the account.^(q)

"The last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or intrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case." Thus if a sheriff unnecessarily delay putting a writ of execution in force, he is liable in an action on the case to the execution creditor.^(r) So if he make a false return to a writ, or allow a prisoner to escape, he may be either attached for the contempt, or be made liable in an action on the case for the damages the execution creditor has sustained.^(s) Thus also an attorney who neglects his client's business is liable to an action on the case for his negligence.^(t) There is also in law an implied contract with a common innkeeper that he will safely keep his guest's goods,^(u) with a common carrier, to be answerable for the goods he carries, but this liability may be limited by special

consideration of this subject, and which I have already had occasion to mention at p. 118.

(n) There is another remedy besides this action; viz., by writ of account, which commands the defendant to render an account to the plaintiff, or show good cause to the contrary. In this action there are two judgments: the first is, that the defendant do account; and the second, that he do pay the plaintiff the amount found to be due. Experience, however, has shown that the most effectual way to settle matters of account is by resorting to a Court of Equity; and actions of account have therefore become almost obsolete. (o) *Hughes v. Thorpe*, 5 M. & W., 667.

(p) *Porter v. Cooper*, 1 Cr. M. & R., 394.

(q) *Bates v. Townley*, 2 Ex., 159.

(r) *Clifton v. Hooper*, 6 Q. B., 468.

(s) *Reg. v. Sheriff of Leicestershire*, 11 C. B., 367; *Arden v. Goodacre*, 11 C. B., 371.

(t) *Hunter v. Caldwell*, 10 Q. B., 69.

(u) *Calye's case*, 1 Smith's L. C., 47.

*contract; (*v*) with a carrier of passengers for hire, that he will be answerable for their *personal* luggage; (*w*) with a workman, [*128] that he performs his business in a workman-like manner: in which if they fail, an action lies to recover damages for such breach of their implied promise or undertaking. So, if an innkeeper opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit, an action will lie against him for damages, if he without good reason refuses to admit a traveller. (*x*)

According to the Civil Law, and the laws of Scotland, of France, and of parts of America, there is, on the sale of a commodity, an implied contract that the vendor has right to dispose of the thing which he sells. But there is by the law of England no warranty of title in the contract of sale, any more than there is of quality, though if the vendor know of and conceal the defective title or the defective quality, he may be held responsible for the fraud in an action on the case, or he may recover back the purchase-money, as on a consideration that has failed, if it can be shown that it was the understanding of both parties that the bargain should be put an end to, if the seller had not a good title, or the article were not of the quality agreed upon. (*y*) But the law of warranty is one of the many subjects to which, in a treatise like the present, it is impossible to do more than merely refer the reader. I have endeavoured throughout only to point out the general principles, on which the law affords redress by action, for the private injuries or wrongs which may be committed in the mutual intercourse of the members of the community. This last chapter has been directed to the consideration of the remedies which the law gives for the non-performance of contracts express or implied; a category in which may be included almost every [*129] possible injury that can be offered to personal property; and I now therefore come to the third part of the treatise, and to an explanation of the mode in which the Superior Courts give the several remedies for private injuries, which I have in the preceding pages pointed out, in an "Action at Law."

PART III.

*CHAPTER I.

[*130]

OF THE SITTINGS AND PROCEEDINGS OF THE SUPERIOR COURTS.

In the first part of this treatise I have described the Superior Courts,

(*v*) *Carr v. Lancashire and Yorkshire Railway Company*, 7 M. & W., 707.

(*w*) *Great Northern Railway Company v. Sheppherd*, 8 Ex., 30.

(*z*) *Fell v. Knight*, 8 M. & W., 269. (*y*) *Morley v. Attenborough*, 3 Ex., 500.

the appellate tribunals which correct their judgments, when erroneous, and the auxiliary courts which assist them in administering the law. In the second part of the volume I have defined the injuries cognizable by the Superior Courts of Common Law, and pointed out the specific remedies by action provided for every possible injury, taking the opportunity, as I went along, of delineating at length the proceedings in the important action of Ejectment. I am now, therefore, to explain the method in which these several remedies are pursued, obtained, and applied, by personal actions.

In treating of the proceedings in such actions, I shall confine myself to the *modern* practice of the courts, as it has been established by "The Common Law Procedure Act, 1852," and regulated, as to details, by the *Regulæ Generales* of Hilary Term, 1853, and as to the system of pleading by the *Regulæ Generales* of Trinity Term, 1853.

Before proceeding, however, to point out the various steps in an ordinary action, it is necessary to refer shortly, for the better understanding of the subject, to the mode in which an action was anciently commenced, to explain the origin of the *Terms* during which the courts sit in banco, and to describe cursorily, the manner in which the general business of the courts is transacted.

[*131] *The *original*, or original writ, was formerly the beginning of foundation of every suit.(a)

When one has received an injury, and desires a satisfaction for it, he is to consider what redress the law has given for that injury, and is thereupon to apply to the crown, the fountain of all justice, for that particular remedy, which the law gives, and he wishes to pursue. Thus for money due on a bond, he may have an action of *debt*; for goods wrongly detained, an action of *detinue* or *trover*; for an assault, an action of *trespass*; or for being thrown out of a coach, or for any consequential injury, an action *on the case*. To this end he had formerly, in all cases, to sue out, by paying the stated fees, an original writ from the Court of Chancery.(b) This writ was a mandatory letter from the crown, directed to the sheriff of the county wherein the injury had been or was supposed to have been committed, requiring him to command the wrongdoer or defendant, either to do justice to the complainant or plaintiff, or else to appear in court, and answer the charge made against him. Whatever the sheriff does in pursuance of any writ, he must *return* or certify to the court which issues it, together with the writ itself. The sheriff, then, returned to the court his obedience to the writ, which was the foundation of the jurisdiction of the court, being the warrant of the crown for the judges to proceed to the determination of the cause. "For it was a maxim introduced by the Normans, that there should be no proceedings before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of anything but what was thus expressly referred to their judgment." These original writs were held to be "demandable of

(a) The use of the original writ in personal actions was abolished by the stat. 2 Wm. IV., c. 39. It is still necessary in the real actions which remain.

(b) *Ante*, p. 20.

“common right, on paying the usual fees; for any delay in the granting them, or setting an unusual *and exorbitant price upon them, [*132] would be a breach of Magna Charta, c. 29, ‘nulli vendemus, [132] nulli negabimus, aut differemus justitiam vel rectum.’”

The day on which the defendant was ordered to appear in court, and on which the sheriff was to bring in the writ, and report how far he had obeyed it, was called the *return* of the writ; it being then returned by him to the justices at Westminster. It was always made returnable at least fifteen days from its date or *teste*, that the defendant might have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four *terms*, in which the court sits for the despatch of business.

1. *The Terms.*

These Terms, Sir Henry Spelman has learnedly shown, were gradually formed from the constitutions of the church.^(c) They have formed the subject of repeated interference by the legislature; for, till a comparatively recent period, the times at which they began, depended on certain moveable festivals of the church. The subject is now no longer practically interesting or important, for the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael, *are now definitely regulated by Act of Parliament. Hilary term begins on the eleventh, [*133] and ends on the thirty-first day of January; Easter term begins on the fifteenth day of April, and ends on the eighth day of May; Trinity term begins on the twenty-second day of May, and ends on the twelfth day of June; and Michaelmas term begins on the second, and ends on the twenty-fifth day of November.

During each of these terms, each of the three superior courts sits in *banco*, as it is called. These sittings in *banco* derive their name from the certain days called *dies in banco*, on which appearances of defendants were formerly made. There were likewise, formerly, other days called the *returns* of the term, on which day all original writs were formerly, and those still subsisting, are now made returnable,

The first return in every term was, properly speaking, the first day in that term. And on that day the court sat to take *essoigns*, or excuses

(c) “Throughout all Christendom” (says Sir William Blackstone), “in very early times the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti* et *nefasti*, went into a contrary extreme, and administered justice upon all days alike. Till at last the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the hay time and harvest. All Sundays, also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition: which was established by a canon of the church, A. D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code.”

(which, according to modern practice, are disused), for such as did not appear according to the writ: wherefore this was usually called the *essoign day* of the term." "But on every return day in the term, the "person summoned had three days of grace, beyond the day named in "the writ, in which to make his appearance; and if he appeared on the "fourth day inclusive, *quarto die post*, it was sufficient. For our sturdy "ancestors held it beneath the condition of a freeman to appear, or to "do any other act, at the precise time appointed," a practice, however, which their successors would do well to avoid. This delay, however, to the *quarto die post*, I only mention, as it is the origin of the modern restriction on motion for new trials, and other similar applications, to the first four days of the term.

The assizes, I have already remarked, (d) take place in the vacations after Hilary and Trinity terms, consequently throughout England all causes tried by jury are determined at these particular periods. If either [*184] party wishes to apply for a new trial, or to *take any other proceeding to prevent the effects of a verdict, viz., judgment and execution, he must apply to the court at its sitting in the term following the trial, and he must do so within the first four days of such term, otherwise he will not be heard, (e) unless, indeed, he can make out a case for the equitable interference of the court. If the cause is tried in term, as it may be if tried in London or Middlesex, application must be made to the court within four days after the trial.

Until recently all matters of law were exclusively disposed of in the courts during term, but in consequence of the press of business of late years, the courts have now received the power of appointing sittings in *banc*, to be held during the vacation. (f)

One of the judges of each court sits daily, during term, at chambers, to dispose of many of the simpler matters, which arise in the course of an action, and require judicial decision. Thus, applications for time to plead, or to strike out or amend pleas or other proceedings generally, form the subject of an application to a judge at chambers; but the orders of judges sitting at chambers are not acts of the court, and if disobeyed can only be enforced by turning them into rules of court, which, however, is done at once, on an application to one of the Masters of the court, and then obtaining an attachment, which can only, however, be had during term.

The greater part of the vacation is occupied in the trial of causes at the assizes. These trials, it will be recollected, do not take place before the court, but before the individual judge or commissioner who tries them. On circuit, however, as we have seen, the judge of *nisi prius* exercises the same powers over the records sent to him for trial and otherwise, as the courts themselves. (g)

During a great part of the long vacation, that is, from the 12th of August till the 24th of October, no pleadings can be delivered in any cause then pending before the superior courts. The proceedings are

(d) *Ante*, p. 44.

(f) 1 & 2 Vict., c. 32.

(e) R. G. H. T., 50.

(g) *Ante*, p. 44.

*entirely stopped for a time. One of the judges, however, attends at chambers to direct and authorize such proceedings as will not admit of delay; as, for instance, to issue a writ of habeas corpus, or writ of certiorari, to the County Court. [*135]

The argument of demurrers, bills of exceptions, or special cases, and motions for a new trial, and similar applications arising out of the proceedings at the trial, constitute the most important part of the business of the courts during term. The argument of demurrers, special cases, &c., takes place on days fixed by the courts. Motions for a new trial, and similar proceedings arising out of trials at nisi prius, ought to be made within the first four days of term, but subject to this rule, applications to the court may be made at any time of its sitting. I must now, therefore, shortly describe the nature of an application to the court and to a judge at chambers. The former is by *motion and rule*, the latter by *summons and order*.

2. *Motions, Affidavits, and Rules.*

A motion is an application by counsel to the court, praying it to grant a rule or give a decision on some matter submitted to it, on which the parties to the action do not or cannot agree. A summons is an application of the same nature made to a judge at chambers, exercising, however, in this respect, all the powers of the court. Thus, if the application be to set aside a judgment as irregularly signed, or to stay proceedings, or to amend pleadings, in each case there is a question for the exercise of the summary or equitable jurisdiction of the court, whose decision is final, or of the judge whose order may be, in ordinary cases, reviewed by the court.

The first decision of the court is generally by a rule nisi, as it is called. This rule, or the summons at chambers, must each contain certain essentials, and both are made known to the opposite party by service in the same way.

It would be out of place here to enumerate the many forms of rules and orders, applicable to different proceedings, or to attempt to point out what each particular application to the court or a judge should be. Such proceedings, in general use, are in printed forms, and issued at the respective offices of the different courts. Where an application to the court or a judge is special, it must be prepared according to the circumstances which render it necessary. [*136]

An application to the court is always made on an affidavit of the facts necessary to support it, which must be made before the rule is moved for, and filed in court, or delivered to the Master when the rule is moved. (h) Previously to moving for a rule nisi, it is sometimes desirable to give notice to the opposite party, either that he may show cause against it, in the first instance, or that costs may not be unnecessarily incurred by him. Indeed, in general, a stay of proceedings will not be granted unless two days' notice has been given to the opposite party. (i)

As affidavits are required in many of the proceedings of the courts, it

(h) R. G. H. T., 1853, 146.

(i) R. G. H. T., 1853, 160.

may not be inopportune in this place to state as succinctly as possible the general rules to be followed in framing these documents, a form of which is given in the note.(k) There is no subject on which the decisions are so numerous.

An affidavit, then, should set forth all necessary facts and circumstances explicitly and with certainty. *Dates, when material, should be [*187] sworn to positively. Where the fact is not within the deponent's knowledge, he should add that he *verily believes it to be true*.

Clerical errors are not sufficient ground for rejecting an affidavit when the meaning is clear. But this depends upon whether the mistake is material or not.

No affidavit can be read or made use of, in the jurat of which there is any interlineation or erasure. But if one jurat be struck out, it may be re-sworn.

An affidavit should not contain unnecessary matter. No stamp is required.

An affidavit should be entitled in the court in which the action is brought. It should also be entitled in the cause, in which case it ought to state the Christian names and surnames at length of all the parties to the action, otherwise it cannot be used. In actions upon *bills, notes*, or other *written instruments*, any of the parties to which are designated by initials, it is sufficient to designate such persons in an affidavit by the same initials, instead of stating the names in full: the affidavit should show such initials to have been used.

If the plaintiff sue, or the defendant is sued, in a representative capacity, as executor, administrator, or assignee, his *representative character* must be stated.

The addition and true abode of the deponent, or of all the deponents, if several, must be stated in the affidavit. Thus, it is sufficient if the deponent describe himself as "of the city of London, merchant," or as "of Bath, in the county of Somerset, esquire."

So the clerk to an attorney must state the place of business of such attorney as his residence.

The affidavit must also state the rank or degree in life, profession, or trade of the deponent, unless he is a party in the cause. Thus, "merchant," "manufacturer," "managing clerk to," &c., "agent of the plaintiff," have been held sufficient additions.

(k) FORM OF AFFIDAVIT.

In the Queen's Bench :

Between { A. B., Plaintiff,
and
C. D., Defendant.

A. B., of _____, the above-named plaintiff, maketh oath and saith that C. D., the above-named defendant [state the matters of fact sworn to.] A. B.

[Jurat.] Sworn in Court at Westminster Hall, the _____ day of _____, 185 .

This form necessarily varies, for there may be several deponents, or it may be made by a quaker, who "affirms," or by executors or administrators, or surviving partners, or sworn before a single judge or a master, or a commissioner, or the deponent may be a foreigner, or the affidavit may be made in a matter which is not a cause. In all these cases the proper form is to be adopted.

The descriptions "acting as managing clerk," &c., *or "articled clerk," are insufficient if it be not stated *to whom*, or in what profession. [*138]

It is not necessary to give any addition to any party mentioned in the affidavit, except to the deponent.

The statement of the matter of fact should be such that perjury may be assigned on it, if it turn out to be false; and whatever may be necessary to make out a case for the interference of the court, should be stated.

Where it is clearly *impossible* to swear *positively*, it is considered sufficient to state the facts "to deponent's knowledge and belief." And affidavits made by parties suing or being sued *en autre droit*, should be as direct and positive as the circumstances of the case will permit.

The court, on hearing the application, either refuses to entertain the motion at all, in which case counsel takes nothing by his motion; or, they grant him a rule to show cause, that is, a rule calling on the opposite party to show cause to the court, in four days, why the thing prayed for by the motion should not be granted. This is a rule *nisi*, which is served on the opposite party or his attorney, at his registered office, (k) who, if he intends to oppose it, must instruct counsel to show cause against it before the end of the four days, for on the fifth day, the counsel who obtained the rule will have a right to make it *absolute*, on an affidavit of the proper service of the rule *nisi*. Cause is shown against the rule on affidavits in answer to those on which it is granted, to which, however, no reply by affidavit is at present permitted. Comment only is allowed; but it is anticipated that the rule in this respect will be altered before long, and affidavits in reply allowed to be filed, so long as there are facts to be stated on either side. When the court has heard both sides, it either discharges the rule, or makes it absolute, or discharges it in part, and makes it absolute in part; for, when one applies for *several things by the same motion, the court may grant some and refuse others, but it cannot grant anything which is not [*139] asked by the motion and given by the rule *nisi*; and, therefore, when a rule has not been moved for with costs, it cannot be made absolute with costs. In other cases, the costs are in the discretion of the court.

Rules are enforced by *attachment*, which is the mode adopted by the courts of punishing contempts of their authority. In order to attach the party disobeying the rule, he must be served *personally* with a copy of it, (l) and the original rule at the same time be shown to him. Compliance must at same time be demanded, and if he neglects or refuses, the other party, on affidavit of these facts, may move for an attachment. There are only two cases in which the contempt is so clear that the rule for an attachment issues in the first instance. (m) A rule to show cause is generally granted, a copy of which is to be served, and on affidavit of service, it is made absolute in the usual way, whereupon a writ may be issued to the sheriff, on which the party is arrested. The courts strictly

(k) Ante, p. 14.

(l) Exp. Willand, 11 C. B., 544.

(m) R. G. H. T., 1853, 168.

require *personal service* both of the original rule and of the rule nisi for the attachment.

Rules of court directing the payment of money as costs or otherwise, may be enforced in this way, or by the ordinary writs of execution.(n)

3. *Summons and Order.*

There are many applications relative to the proceedings in an action which, even when the courts are sitting during Term, are too unimportant in their nature, to be brought before the full court. Thus, applications for further time to plead, or to amend a plea, or to strike out pleas, or for leave to plead several matters, are generally made to a judge sitting at chambers. In general, any point of practice, which is not expressly ordered to be brought before *the court, may be disposed of by a judge at chambers. And by stat. 11 Geo. IV., and 1 Wm. IV., c. 70, a judge of any one of the superior courts may now hear at chambers applications arising out of causes not only in his own, but in the other courts. During the circuits, one judge, therefore, as I have stated, always remains in town, and transacts the business of all the three courts.

The mode of applying to a judge at chambers (except in cases in which the application is necessarily *ex parte*, as where an application is made for a *capias* to arrest an absconding debtor), is by a *summons* issued by the judge's clerk, a copy of which must be served upon the opposite party. If the party does not appear to oppose the application, the applicant's attorney, after having waited half an hour, may have the order made out as directed in the summons,(o) for the summons is in the nature of a rule nisi, and calls upon the opposite party to show cause why such an order as that applied for should not be made.(p) If the other party appears to show cause, the application is discussed before and determined by the judge, unless, indeed, the case is of sufficient importance to justify the application being referred to the full court; in which case the judge will generally stay proceedings until the court can be moved. The order, when made, must be drawn up and served on the opposite party, otherwise it may be treated as abandoned. The costs of the application at chambers are left entirely to the judge's discretion, and his order is an authority to the Master, to draw up a rule of court to the same effect, which, if disobeyed, may be enforced by attachment or writ of execution. The party against whom the order is made may move the full court to rescind it. But the court does not generally set aside a judge's order with costs.

The rule to show cause may vary as to the time it gives for doing so; it is generally four days. The return of the summons at chambers, likewise varies, *both as to time and place. It may be made returnable at chambers, or at the judge's private residence, or at Westminster in the morning,—as, for instance, to prevent judgment being signed when the office opens.

(n) 1 & 2 Vict., c. 110, s. 19. R. G. H. T., 1853, Appendix.

(o) R. G. H. T., 1853, 153.

(p) See a form, ante p. 79.

Where a stay of proceedings is made part of the order, the stay is, in the case of a summons, from the time *that it is returnable*; in the case of a rule of court, from the time *that it is served*.

4. *Service of Rules, Notices, &c.*

It may be useful to refer shortly to the mode in which rules nisi, summonses taken out at chambers, and many of the notices required in legal proceedings, should be served on the opposite party. The cases on the subject are extremely numerous (2 Chit. Arch. 1416.)

The service of a rule nisi or of a summons is effected by giving to or leaving for the opposite party a copy thereof. The original need not be shown unless sight of it is demanded. It must be served before seven o'clock at night,^(g) at the registered office of the opposite party's attorney,^(r) and a reasonable time before the time fixed for showing cause. Personal service is only required in the case of a rule nisi for an attachment.

If the opposite party sues or defends in person, the rule or summons must be served at the address given by the defendant on entering an appearance to the action.

Service on one of several plaintiffs is sufficient, and so is service on one of several defendants jointly defending.

Irregularity in the mode of service may be waived by the party moving to enlarge the rule, or appearing to show cause against it; but such appearance does not waive any irregularity in a copy served.

Where a rule or order directs all proceedings to be stayed, no further proceedings can be taken, even to discontinue the action, and any proceedings taken *in defiance of it will be set aside. No stay of [*142] proceedings will, in general, be granted on the last day of Term.

Such being the mode in which the courts proceed by motion and rule, or summons and order, it is only to be added that these proceedings may be resorted to in Term or vacation, as the case may be, whenever, in the progress of an action, it becomes necessary to do so. I shall now go on to describe the ordinary steps in an action; and it will be recollected that if, in the course of these proceedings, any irregularity is committed, or any hardship or injustice is likely to arise, from the strict enforcement of the rules of practice, by which, as we have seen, all these proceedings are regulated, the party aggrieved may, at whatever stage of the action the necessity may arise, have recourse for relief to the summary or equitable jurisdiction of the courts, which I have already explained; for all these rules are intended to promote the ends of justice, and are in no way to be perverted or abused, so as to produce hardship, injury, or oppression.

(g) R. G. H. T., 1853, 164.

(r) Ante, p. 14.

CHAPTER II.

OF PROCESS, ARREST, THE FORMS OF ACTION, THE STATUTES OF LIMITATION, AND NOTICE OF ACTION.

BEFORE I proceed, however, to describe the writ of summons by which all personal actions brought in the superior courts are now commenced, it may be useful briefly to notice, first, the ancient *process*, by which the defendant was compelled to appear in court to answer the plaintiff's claim; secondly, the means by which the *arrest* of a defendant, who is about to attempt by flight to elude payment of a just debt, or escape performance of a legal obligation, is effected, so that security may be obtained for his appearance; thirdly, the different *forms of action*, now in use in the superior courts; fourthly, the *statutes of limitation*, which [*143] prescribe the periods *within which the respective remedies by action, for the several injuries I have before enumerated, may be pursued; and fifthly, the cases in which the law requires that the defendant shall have a previous notice of the action intended to be brought against him, and an opportunity thus given to him of tendering amends to the injured party.

1. *Process.*

The next step, then, for carrying on the action, after the plaintiff had sued out the original writ, was called the *process*. It was sometimes called *original process* (a designation often given to the modern writ of summons,) as being founded upon the original writ, and also to distinguish it from *mesne process*, which issues pending the action, and in the course of the proceedings therein. A writ of *capias*, which is sometimes sued out at the same time as a writ of summons, in order to arrest a fugitive debtor, is called *mesne process*. So the judge's precept to summon jurors or witnesses may be termed *mesne process*; a term which is also sometimes used in contradistinction to *final process*, or process of *execution*, which comprises the various writs, by which the judgment of the court is enforced against the person or property of the unsuccessful litigant.

The first step of the ancient process was to give the defendant notice to obey the writ. This notice was given ordinarily by *summons*, which was a warning to the defendant to appear in court at the return of the original writ, given by two of the sheriff's messengers, called *summoners*, either to the defendant in person, or left at his house, or on his land.

If the defendant disobeyed this monition, the next process was a writ of *attachment* or *pone* (so called from the words of the writ, "*pone per vadium et salvos plegios*," "put by gage and safe pledges," A. B. the defendant, &c.) which was grounded on the non-appearance of the defendant, and commanded the sheriff to attach him by taking *gage*, that

is, certain of his goods, which he should forfeit if he *failed to appear; or by making him find *safe pledges* or sureties, who [*144] should be amerced in case of his non-appearance. This, it may be remarked, was the first process upon actions of *trespass*, where the legal violence which accompanied the injury, it was considered, required a speedy remedy; and therefore justified the attachment of the defendant at once, without any warning. From this proceeding of taking pledges is derived the modern system of requiring a defendant to give bail.

If the defendant, having been attached, neglected to appear, or if the sheriff returned nihil (i. e., that the defendant had nothing whereby he might be summoned, attached, or distrained,) a writ of *capias* issued, commanding the sheriff to take the body of the defendant, if found in his bailiwick, so that he might have him in court at the return of the original writ. This writ of *capias*, and all others subsequent to the original writ, not issuing out of chancery, but from the court into which the original writ was made returnable, and being grounded on what had passed in that court in consequence of the sheriff's return, were called *judicial*, not *original* writs, for they issued under the private seal of the particular court, in which the action was brought, and not under the Great Seal of England, and were *tested*, not in the name of the sovereign, but in that of the chief or senior judge of the court.

The proceedings, previous to the issue of the *capias*, became in course of time merely formal, and it was usual in practice to sue out the *capias*, in the first instance, upon a supposed return of the sheriff, a fictitious original being afterwards drawn up, if necessary, to give the proceedings the appearance of regularity. And thus it is why, in the novels and farces of the last, and even of the present century, we find the bailiff invariably represented as at once taking a debtor prisoner on a writ. "This fiction" [i. e., the fiction, by which all the steps intended to give a defendant notice of the action, and which preceded his actual, and often oppressive arrest, were considered by the courts, to have been regularly *taken, though not one of them was taken in point of fact,] "being beneficial to all parties" (says Sir William Blackstone, [*145] "was readily acquiesced in, and became the settled practice; being "one among many instances to illustrate that maxim of law, that in fictione juris consistit æquitas." But notwithstanding this eulogium, the practice, so "beneficial to all parties," has for many years been entirely altered, and a defendant no longer learns, for the first time, that an action has been brought against him, by finding himself in the custody of a sheriff's officer.

The original writ, after having been for centuries an imaginary proceeding altogether, was (except in real actions) abolished by the stat. 2 Will. IV., c. 39. This statute also directed all personal actions to be commenced by a writ of summons, resembling closely that now in use under the Common Law Procedure Act. It is not my intention, however, to trouble the reader with the causes which induced the change, as such information is now of no practical use whatever. It is only when some acquaintance with the ancient mode of proceeding is necessary to a proper understand-

ing of the present practice, that I shall venture to refer to the ancient and now happily obsolete formalities of the courts.

2. Arrest.

Farther changes in the mode of commencing personal actions were made by the Statute 1 & 2 Vict., c. 110, by which that ancient piece of oppression, arrest on mesne process, was entirely abolished. The provisions of this statute as to the mode of commencing personal actions, as well as the enactments of the previous statute (2 Will. IV., c. 39), in this respect have been superseded by those of the Common Law Procedure Act, 1852. The arrest of an absconding defendant is still, however, regulated by the 1 & 2 Vict., c. 110, which provides, that whenever it can be shown to the satisfaction of a judge of one of the superior courts, [146] *amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant is about to quit England, unless he shall be apprehended, the judge may direct that such defendant shall be held to bail, and that a writ of *capias* may be sued out, on which the sheriff may then proceed to arrest the defendant, who shall remain in custody until he finds bail to the amount endorsed on the writ, or deposits that amount in the hands of the sheriff, with 10*l.* for costs, to await the result of the action. (a)

To obtain an order to hold the defendant to bail, it is necessary that the creditor shall commence an action at the same time against the debtor. The plaintiff must satisfy the judge, not only of the existence of the debt but of the defendant's intention to abscond. This is always done by affidavit, which must be most carefully prepared, for if deficient in any respect, the defendant, when arrested, may apply for and obtain his discharge from custody. The application to hold the defendant to bail is of course *ex parte*, and is always made to a judge at chambers. If the judge makes an order to hold the defendant to bail [and he may do so, not only in actions brought to recover a *debt* properly so called, but in [147] actions *in which the plaintiff seeks a reparation in *damages*, as for crim. con. or other injury], the plaintiff prepares the writ of *capias*, in the form prescribed by the statute, gets it sealed at the office

(a) Where the absconding debtor is at some distance from London, so that there is not time to obtain a writ of *capias* from one of the superior courts, the creditor may apply to the nearest County Court Judge or Commissioner in Bankruptcy, for a warrant to arrest the defendant and detain him for seven days. This application can only be made when the plaintiff's demand is in the nature of a *debt*. The judge or commissioner applied to must be satisfied by affidavit of the existence and amount of the debt, and also of the debtor's intention to abscond. The warrant, when granted, may be executed in any part of England; but it is only in force for seven days, and before the expiration of that period, a writ of *capias* must be obtained, otherwise the whole proceedings are nugatory. A debtor, when arrested, may give bail or deposit the amount endorsed on the warrant, and thereupon be liberated, and he may also apply to the judge or commissioner granting the warrant, or to any judge of the superior courts, to set it aside. When the *capias* is in the hands of the sheriff, to whose custody the debtor must be transferred, he is in custody under the *capias*, as if he had been originally arrested on that writ.—*The Absconding Debtor's Arrest Act, 1851.*

of the court in which the action against the debtor is brought, and then puts it in the hands of the sheriff, i. e. of his deputy in London, with the requisite instructions where to find the defendant. The sheriff's deputy then makes out the necessary warrant to his officer, whose duty it then becomes, with all due speed, to execute it, by arresting the defendant.

An *arrest* is made by the corporal seizing or touching the defendant's body; "after which the bailiff may justify breaking open the house in which he is, to take him: otherwise he has no such power; but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence." The bailiff must also be careful to avoid arresting any one who is privileged from arrest, as a privileged person will be at once set at liberty, and may have an action for false imprisonment.

The privilege of the royal family extends to and includes the servants in ordinary of the Crown, who cannot be arrested unless upon leave obtained from the Lord Chamberlain. The Queen's chaplains, the Lords of the bedchamber, the clerk of the kitchen, &c., are privileged. The servants of a queen dowager or queen consort are not; and the privilege does not extend to a herald.

Ambassadors and ministers of foreign states, and their domestics, are privileged from arrest; but consuls and their servants are not; nor are the couriers or messengers of foreign ministers.

Peers of the realm, and peeresses by birth, creation, or marriage, are privileged. Members of parliament are privileged from arrest during the session, and for forty days after it: and as parliament is never prorogued for more than forty days, it may be considered that a member of parliament is always privileged. So members of convocation, actually attending thereon, by statute 8 Hen. VI., c. 1, are privileged. [*148]

The judges of the superior courts cannot be arrested; and clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrest. Barristers, attorneys, suitors, witnesses, and other persons, necessarily attending any courts upon business, are not to be arrested during their actual attendance, which includes their necessary going to, waiting in, and returning from court. Certificated bankrupts, discharged insolvents, and persons having an order of protection should not be arrested; neither can a married woman be taken, nor should an infant, who, however, is left to plead his infancy. Seamen and soldiers have certain privileges in this respect conferred by the Annual Mutiny Acts. Executors, administrators, and heirs cannot be held to bail for the debts of the deceased; and a defendant once arrested can never be arrested again for the same cause of action.

No arrest can be made in the presence of the Queen, nor in any place where the Queen's justices are actually sitting. The Sovereign has moreover a special prerogative, seldom exerted however, (b) by writ of *protection* to privilege a defendant for one year at a time, and no longer.

(b) King William, in 1692, granted a protection to Lord Cutts, to protect him from being outlawed by his tailor (3 Lev. 322;) which is the last that appears upon our books.

No arrest can be made, nor process served upon a Sunday,(c) except for treason, felony, or breach of the peace.

When the defendant is regularly arrested, he must either go to prison, for safe custody, deposit the amount endorsed on the capias, with £10 for costs with the sheriff, or put in *bail*. The arrest is only to compel an appearance in court to the action, and that purpose is answered, whether the sheriff detains his person, receives the amount sued for, or takes security for the defendant's appearance, called *bail*, *(from the [*149] French *bailleur*, to deliver,) because the defendant is bailed, or delivered, to his sureties or bail, upon their giving security for his appearance; and is supposed to continue in their friendly custody instead of going to gaol. Putting in bail to the sheriff is by entering into a bond, with one or more sureties that the defendant shall put in special bail to the action which has been brought against him, which obligation is called the *Bail-Bond*. The sheriff *may* let the defendant go without sureties at his own peril; for after taking him he is bound to keep him safely, otherwise an action lies against him for an escape. On the other hand, he is obliged to take, if tendered, a sufficient bail-bond, usually for double the sum indorsed on the writ.(d)

The object of arresting the defendant is only that he may not elude the judgment of the court in the action. He ought, therefore to appear to the writ of summons, in the way and according to the form which I shall have occasion to describe afterwards. If he fail to do so, or rather to put in special bail to the action itself, and the bail that were taken by the sheriff *below* are responsible persons, the plaintiff may take an assignment of the bail-bond, and bring an action thereon against the bail. The plaintiff may also proceed against the sheriff, by ruling him, first, to return the writ, and afterwards to bring in the body of the defendant.(e) If the sheriff does not then cause sufficient bail to be put in and perfected *above*, he will himself be responsible to the plaintiff, having his own remedy over, by action against the bail.(f)

The bail *above*, or bail *to the action*, must be put in either in open court, or before one of the judges thereof; or, in the country, before a commissioner appointed for that purpose. These bail, who must be two in number, enter into recognizance in a sum equal (or in some cases double) to that which the plaintiff is sworn to; whereby they undertake, [*150] that if the defendant be condemned in the action, he *shall pay the amount of the debt or damages and costs, or render himself a prisoner, or that they will pay it for him. This recognizance is transmitted to the court in a slip of parchment entitled a *bail piece*. If excepted to, the bail must be *perfected*, that is, they must *justify*, by swearing themselves to be worth the full sum for which they are bail, over and above what will pay all their debts, and over and above every other sum for which they are bail.(g) The bail may be discharged at any time by surrendering the defendant into custody, within the time allowed by law;(h) for which purpose they are at all times entitled to a warrant to apprehend him.

(c) 29 Car. II. c. 7. *Rex v. Eggington*, Weekly Reporter, 1853-54, 10.

(d) R. G. H. T., 1853, 84, 85.

(e) Ibid., 1853, 89, 90.

(f) Ibid., 1853, 83.

(g) R. G. H. T., 1853, 93, 94, 96, 99.

(h) Ibid., 1853, 105, 106, 108.

The modern proceedings, after an arrest of the defendant, in compelling him to find bail are, therefore, as I have pointed out, derived from the ancient process by which the appearance of the defendant to the action is compelled. The modern process to compel an appearance is by writ of summons only, and I shall afterwards point out how, if appearance be not made to that writ by the defendant, the plaintiff is at once entitled to judgment. This seems to me the best opportunity, however, of describing the proceedings which take place when a defendant is held to bail, a subject on which I shall not have another opportunity of touching.

In the preceding chapters of this treatise I have had occasion from time to time to mention the different personal actions in use, and the division and nature of actions generally. I have not yet alluded at all to the various periods of time within which the respective remedies to be obtained by these several actions, must be pursued; nor yet, in what cases, a notice of action must be given to the defendant.

Actions, I have pointed out, vary according to the nature of the remedy the plaintiff seeks.

Dower, Right of Dower, and Quare Impedit, constitute the only *real actions* left, unless the Action of Ejectment to try title may be termed a real action, as being brought for the recovery of real property. *Of *mixed actions* we have now none, unless one form of the [*151] action of ejectment in which arrears of rent are recovered be so considered.

Under *personal actions*, again, are classed all claims for debts, all demands founded on contracts, all suits brought to recover damages for injuries done to the person or to property.

These are said, therefore, to arise *ex contractu*, or *ex delicto*, a division, as well as the terms used to express it, derived from the civil law.

3. *Forms of Action.*

The different actions which are said to arise *ex contractu*, or to be founded on contract, are—

1. *Covenant*, which lies to recover damages which the plaintiff has sustained by the breach of a covenant, or agreement under seal of the defendant.

2. *Debt*, which lies where there is a *legal* liability on the defendant to pay to the plaintiff a sum certain, whether that sum be due by deed, the judgment of a court, or on simple contract. Debt is also the form of action in which the penalties given by acts of Parliament are generally to be recovered; and

3. *Assumpsit*, which lies to recover the damages which have been incurred by the breach of an agreement or simple contract. It lies on bills or notes, on policies of assurance, on charter-parties, on sales of goods, loans of money, or guaranties; in fact, in almost all the cases in which a claim for money or damages arises to a plaintiff out of the every-day transactions of life.

Besides these three actions properly arising *ex contractu*, there are

4. *Annuity*, a form of action now quite obsolete. It was the old remedy for the grantee of an annuity; but in all modern deeds by which annuities are created, there is always a covenant for payment, on which the grantee may bring an action of covenant; and—

[*152] 5. *Account*, which lies against him who ought to *render an account, but who refuses to do so. This form of action I have stated already is rarely resorted to, proceedings in equity being considered preferable.⁽ⁱ⁾

We have seen that the law implies a promise by every member of the community to satisfy the judgment of a court of justice.^(k) From this quasi contract, we have—

6. *Revivor*, a form of action given by the Common Law Procedure Act, which lies to enforce a judgment, and has come in place, in several instances, of the former writ of *scire facias*. It partakes to some extent of the nature of an action, and the defendant pleads as in other cases.

I have already pointed out^(l) in what circumstances may be brought the other action arising *quasi ex contractu*, viz.—

7. *Scire facias*, a form of action which also lies against bail on a recognizance; against the individual members of a public company, after judgment against the public officer thereof; and in other cases which I need not here specify. The proceedings in *scire facias* differ in some respects from those in ordinary actions, but it is sufficient here to call attention to the fact.

The actions which are said to arise *ex delicto*, or those resulting from torts or wrongs, are—

1. *Trespass*, which lies for a direct injury either to real property, in which case, it is *trespass quare clausum fregit*; or to personal property or for immediate injury to the person, as by assault.

2. *Case* which lies for any *consequential* injury, either to real or personal property, or to the person.

3. *Trover*, which lies for the recovery from the defendant in damages, of the value of any chattels of the plaintiff, which the defendant has wrongfully converted to his own use.

[*153] *4. *Detinue*, which lies for the recovery by the plaintiff of his specific goods or chattels, deeds or writings, wrongfully *detained* from him by the defendant; and—

5. *Replevin*, which is brought to try the right to the possession of goods and chattels, and is founded on a wrongful taking of them by the defendant. It is chiefly resorted to in the case of a distress for rent, and is commenced in the County Court, as has already been pointed out at length.

4. *The Statutes of Limitation.*

Interest reipublice ut sit finis litium. On this principle, and to pre-

(i) See a recent instance however, *Beer v. Beer*, 12 C. B. 82.

(k) Ante, p. 122.

(l) Ante, p. 52.

test people against old or unfounded claims, several statutes have been passed for the purpose of limiting the time, within which the different remedies by action, which the law gives for the several kinds of civil injuries I have before enumerated, must be pursued. These statutes are hence called "Statutes of Limitation," and they require to be specially pleaded to any action, which is barred in this way by lapse of time. I shall have occasion afterwards to mention these statutes, in reference to the pleadings in personal actions. In the meantime, therefore, it may be enough to state shortly, as I have done already in reference to the recovery of real property, what these periods of limitation are.

Actions of trespass, then, for injuries to the person must be brought within *four*, and for slander within *two years*. Actions of trespass *quare clausum fregit*, detinue, trover, case, assumpsit, and *debt* on simple contract, must be brought within *six years* after the cause of action accrued to the plaintiff. Actions of debt or covenant, founded on deeds or recognizances, must be brought within *twenty years*. Actions on penal statutes must be brought—when by the party grieved—within *two years*; when by an informer—within *one*.

If the plaintiff be a married woman, an infant, or insane, the time does not begin to run till these impediments are removed. If the defendant be beyond seas, the time does not begin to run until his return. [*154]

Of late years numerous Acts of Parliament have been passed, which are denominated *Local or Personal*, or *Local and Personal Acts*; this distinction I need not here define. The period within which an action may be brought for anything done under the authority of such Acts is *two years*, or in case of continuing damage, *one year* after such damage shall have ceased.

The limitation most frequently pleaded in personal actions, however, is that of simple contract debts.

To prevent a claim being thus barred, it is essential that the creditor should commence proceedings by suing out a writ of summons within six years of the time when the cause of action first accrued. The action is thus begun within the time; and if the defendant cannot be served, so as to enable the plaintiff to proceed to judgment, the writ may be renewed at any time within six months of its date; and again and again renewed, if necessary, so that the proceedings are, as it were, kept alive down to the time when the defendant can, by service of the writ, be brought into court, and the plaintiff proceed with his action.

5. Notice of Actions.

Not only has a plaintiff, however, to take care lest by lapse of time his debt should be lost altogether, but the party injured has in many cases certain preliminary proceedings to adopt, in order to complete his right of action before a writ is issued. Thus, an attorney (before he can sue for his bill of costs, if it include a single item for business done in a court of law or equity) must deliver a signed bill a month before he commences his action. If he fails to do so, his neglect may be pleaded in bar of the suit. So also in many cases, before an action is commenced, a *notice of*

action must be given to the defendant, in order that he may have an opportunity of tendering amends to the plaintiff, and thereby avoiding [155] the expense and exposure of legal proceedings. Thus, *before any action can be brought against a justice of the peace, for anything done in the execution of his office, the plaintiff must give the defendant one calendar month's notice in writing, which notice must state plainly the cause of action, and must also have endorsed upon it the name and place of abode of the attorney or agent of the plaintiff, to whom the defendant may tender amends, if he thinks proper to do so. And if such notice be not given or be insufficient, the want of it may be pleaded in bar to the action. Again, before any action is to be brought against a constable, for anything done under the warrant of a justice, a demand, in writing, of a perusal and copy of the warrant must be made. If this be not granted within six days, the plaintiff may bring his action against the constable alone, but if a perusal and copy be granted, the plaintiff must join the justice as a co-defendant, in order that he may plead to the action certain protective pleas, allowed to those engaged in the administration of justice, without which privilege no one would be found to accept judicial office. The production and proof of the warrant (at the trial) entitle the constable to a verdict; but if the justice had no jurisdiction, the plaintiff will be entitled to a verdict against him. Finally, there are many Acts of Parliament, which require a notice of action to be given to the persons sued for something done in the exercise of a public office; but the instances in which such a notice is requisite it would be impossible to enumerate here. The notice, it may be added, must always be given one calendar month at least before the action is commenced.(m)

CHAPTER III.

THE WRIT OF SUMMONS.

WE now come to the commencement of the action itself, and to the means now used by the Superior Courts for compelling the defendant to answer the [156] *claim of the plaintiff, or have judgment given against him. This is effected by a "Writ of Summons," which is a *judicial writ*, issuing in the name of the Sovereign, directed to the defendant, and informing him of the name of the plaintiff and of the amount of his claim. It is prepared by the plaintiff, and varies in form, according as the defendant is or is not resident within the jurisdiction of the court, and is or is not a British subject.

Every defendant, it is evident, must reside either within or beyond the jurisdiction of the court. If he resides within the jurisdiction, the form of writ to be used is that appropriated for defendants so situated; if the

(m) 5 & 6 Vic. c. 97.

There are, therefore, three forms of writs of summons :—

2. The writ to be addressed to a British subject residing beyond the jurisdiction of the court ; and,

By one or other of these different forms of writs must all personal actions be commenced. They differ very slightly from each other, but the substitution, by mistake or inadvertence, of one form of writ when another form ought to have been used, constitutes no objection whatever to the process, which may be amended upon an *ex parte* application to a judge at chambers (s. 21). (b)

The first species of writ is by far the most important in practice. To it, therefore, our attention must be first and chiefly directed. It is in the following:—

To C. D., of _____ in the county of _____

(a) There is another form of writ given to plaintiffs by the Bankrupt Law Consolidation Act (12 & 13 Vict., c. 106, s. 77), against defendants who are traders having privilege of Parliament, and who are not therefore subject to arrest either on mesne or final process. The object of that writ is, however, merely to make a failure by the defendant to pay or secure the debt claimed, or to enter an appearance to the action, an act of bankruptcy. It is not necessary on this account to do more here than merely refer to this form of writ.

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N. B.—This writ is to be served within six calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

The writ is directed to the defendant, whose Christian name and surname ought to be correctly stated, though he may be addressed by the name which he bears by reputation.(c) Parties sued on bills, notes, and [*158] *written instruments may be described by the initials or contractions used by them in such instruments.(d) A titled person ought to be described by his title,(e) but a misnomer may be rectified by a judge's order.(f) The residence or supposed residence of the defendant should also be stated, for the omission of the "place and county" will be an irregularity.(g) amenable, however by a judge's order.

The writ commands the defendant to cause an appearance to be entered for him in court (the mode of doing which will be afterwards explained) and notifies to him that in default of his so doing, the plaintiff may proceed to judgment and execution. The name of the plaintiff is, therefore, also to be stated, and it ought to be stated correctly, although a writ cannot be set aside for a mere misnomer of the plaintiff.(h) The addition of neither party is required, nor is it necessary to state, whether the party sues or is sued in a representative capacity as executor, administrator, or assignee. It is better generally not to do so;(i) but it may be desirable sometimes to show to the defendant, by the writ, either that the plaintiff sues or that he is himself sued en autre droit, for instance, to prevent an executor paying another creditor.(k)

If the writ is specially endorsed in the way I shall afterwards describe, and there is no appearance by the defendant, judgment may be signed on the expiration of eight days after service of the writ. If not so endorsed, other proceedings are necessary before signing judgment.(l)

A memorandum is subscribed to the writ, directing its execution within six calendar months, after which period it ceases to be of force, unless renewed in the manner about to be mentioned.

[*159] *If the writ should be served after the six months have expired, the defendant may apply to a judge at chambers to set aside the service, which may be done provided the application be made at once, and before the defendant takes any other step in the cause,(m) for the defendant may appear to the writ after the six months have expired if he chooses to do so.(n) If the writ did not contain the memorandum required, it would formerly have been set aside as irregular.(o) It will probably, under such circumstances, be now amended by a judge at chambers.

(c) *Williams v. Bryant*, 5 M. & W. 447.

(d) 3 & 4 Will. IV. c. 42.

(e) *Wells v. Lord Suffield*, 5 D. L. 177.

(f) *Rust v. Kennedy*, 7 Dowl. 199.

(g) *Ross v. Gandell*, 7 C. B. 766.

(h) *Walker v. Parkins*, 2 D. & L. 298.

(i) *Anon.*, 1 Dowl. 97, n.

(k) *Ante*, p. 9. *Rees v. Morgan*, 5 B. & Ad. 1035.

(l) *Common Law Procedure Act*, 1852, s. 25.

(m) *Kemp v. Warren*, 2 Dowl. n. s. 735.

(n) *Richardson v. Daley*. 7 Dowl. 25.

(o) *Day v. Holly*, 2 Dowl. N. S. 974.

The writ must also bear date on the day on which it is issued: and it must be tested in the name of the chief justice, or chief baron, or, in case of vacancy, of the senior puisne judge of the court out of which it issues (s. 5). A writ without any date would be irregular; (p) there would be no date from which the defendant might see whether it had been served within the six months, and a writ dated on a Sunday will be a nullity. (q)

A defendant is entitled to full information as to the person to whom he may address himself for a settlement of the action; and the writ must for this purpose have certain indorsements. The first of these indorsements is the name and abode of the attorney actually suing out the writ; or, if no attorney is employed, then a memorandum, expressing it to have been sued out by the plaintiff in person, and mentioning the particulars of the plaintiff's residence (s. 6).

Thus, the writ must be indorsed:—

This writ was issued by H. J. S., of _____, attorney for the said plaintiff;

Or,

This writ was issued in person by A. B., who resides at [mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]

*The other indorsement is simply a statement of the plaintiff's claim; and its statutory form is as follows:— [*160]

"The plaintiff claims £ _____ for debt, and £ _____ for costs, and if the amount thereof be paid to the plaintiff or to his attorney within four days from the service hereof, further proceedings will be stayed."

The object of these indorsements is to enable the defendant to put an end to the action at once, by satisfying the plaintiff's demand. It is only on payment of that demand within four days that proceedings will be stayed; for, if the plaintiff proceeds with the action, after such payment, the defendant may apply to a judge at chambers to make an order staying the proceedings, which will be done, and the plaintiff at the same time punished by having to pay the costs of the application. The defendant is at liberty, notwithstanding payment of the costs endorsed on the writ, to have them afterwards taxed; and if more than one-sixth be disallowed, the plaintiff will have to pay the costs of taxation (s. 8).

If the plaintiff's demand is not paid within the four days, the plaintiff is no longer bound to accept the amount endorsed; (r) but if he refuse to do so, the defendant may then apply at chambers for a summons, calling on the plaintiff to show cause why, on payment of the amount endorsed, all proceedings should not be stayed; and unless the plaintiff can show good

(p) Wells v. Dawson, 2 Dowl. N. S. 468.

(q) Hanson v. Shackleton, 4 Dowl. 48.

(r) Jacquot v. Bourra, 5 M. & W. 156.

cause at the return of the summons, an order staying proceedings will be made.

Important, however, as are these indorsements, the omission to insert or indorse any of the matters required to be inserted in, or indorsed on it, does not render the writ *void*, but merely affords to the defendant good grounds for applying to the court out of which the writ issued, or to a judge at chambers, to have it set aside for *irregularity*, which may be done, or the plaintiff be compelled to incur the costs of amending it (s. 20).

[*161] *The plaintiff, or his attorney, having prepared the writ, and made all these necessary indorsements, will next set the law in motion, by having the writ sealed at the office of the court from which it is to issue. This is done by the proper officer, on the plaintiff delivering to him a note of the names of the parties to the action, which is called a *præcipe*, and which is generally in this form :—

Writ of summons for A. B., against C. D., of in the county of
H. J. S., plaintiff's attorney.

When thus sealed, the writ becomes, as I have stated already, in reference to the writ of ejectment, a letter missive from the sovereign to the defendant, commanding him to do as therein directed, or incur the consequences. This command is also notified to the defendant by service of a copy of the writ in the manner I shall afterwards describe.

There are many actions in which there are several defendants, each of whom is of course to be served with the writ. The law, therefore, allows the plaintiff, either when he sues out the original writ of summons, or at any time while that writ is in force, to issue one or more concurrent writ or writs, each of which must bear teste of the same day as the original writ, and be marked with a seal bearing the word "concurrent," and the date of its own issue. Such concurrent writ or writs are only in force for the period during which the original writ is in force (s. 9.) This power of issuing concurrent writs is of great advantage, where expedition in serving several defendants is required, and these defendants reside in different parts of the country.

The writs must correspond with each other, and the defendant, as is just, will only be liable for the costs of the writ with which he is served.(s)

We have also seen that no original writ of summons is in force for [*162] more than six months(t) from its date: but if any defendant has not been served therewith, the original or any concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being resealed with the renewal seal kept at the offices of the court (s. 11.) This is done upon delivery to the proper official of a *præcipe* which may be in this form :—

(s) *Angus v. Coppard*, 3 M. & W. 57.

(t) Months, i. e., calendar months: (13 & 14 Vict. c. 21, s. 4.)

*Renewed Writ of Summons for A. B. against C. D., of in the
county of.*

H. J. S., &c.

A writ of summons so renewed remains in force, and is available to prevent the operation of any statute whereby the time for the commencement of the action may be limited,^(u) and for all other purposes, from the date of the issuing of the original writ of summons (s. 11).

2. *The Writ of Summons, where the defendant resides within the jurisdiction, in cases where it may be specially indorsed.*

The immediate object of the *summons* given by the sheriff's summoners on the original writ, and of the *capias* (when that barbarous mode of proceeding was in use,) was, and of the more modern *writ of summons*, is, to cause the defendant to appear in court, to answer to the action, so as to enable the plaintiff to proceed against him, by a proper statement, and proper proof, if necessary, of his claim. Until the reign of George the First, it was considered essential, in order to obtain a judgment against the defendant, that he should have appeared by himself or by his attorney. The courts would not give judgment against a defendant who was not before them, either to deny, or by silence to confess the justice of the plaintiff's demand.

In that reign an Act passed authorizing the plaintiff, on an affidavit of personal service (by which, *therefore, the defendant was made fully aware of the plaintiff's proceedings,) to enter an appearance for [*163] the defendant, "according to the statute." By this transparent fiction, the requirement of the courts, that the defendant should be before them, was satisfied; and the plaintiff might thereafter proceed as if the defendant had personally appeared.

It was discovered, after the lapse of upwards of a century, that this proceeding was an unmeaning form; and that, if the defendant did not appear at all, after having been personally served, to compel the plaintiff to appear for him was practically to put the plaintiff, in the first instance, and the defendant (whose course was one to avoid expense) ultimately, to greater cost. The plaintiff may now, on personal service, or when reasonable efforts have been used to effect it, proceed as though the defendant had been served (s. 17).

The original writ ordered the sheriff to call upon the defendant to appear and answer the plaintiff of a plea of *debt*, for instance; it gave him no other information whatever. When arrested on the more recent *capias*, the defendant found that he was to answer the plaintiff of a plea of *trespass*, which, after lengthy legal proceedings, he found to consist probably in the breach of his implied promise to pay his tailor for a coat. It was only after the defendant had given bail, and appeared to the action, that the plaintiff "counted," or "declared" what was the nature of his demand. This course of proceeding continued to be the practice until recently.

(u) Ante p. 153.

The writ called upon the defendant to appear to answer the complaint; the declaration told him, if he appeared, what the complaint was. But if the action were undefended, and the plaintiff entered an appearance for the defendant, he did so only that he might thereafter declare against him; and that, thereupon, the cause of action being fully stated to the absent defendant, and no answer being made by him, judgment might be given against him by the court. This mode of proceeding is now, to the [*164] credit of the law, to some extent abolished, by allowing *the plaintiff, in certain cases, to give the defendant the same information the back of the writ (by a special indorsement,) which he formerly gave in the declaration.

In all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, the plaintiff shall be at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim in a prescribed form (s. 25). This special indorsement is to be introduced after the general indorsement of the amount of the plaintiff's claim. (v) The subjoined forms may be used.

The following are the particulars of the plaintiff's claim:—

1849.—June 20. Half-year's rent to this day of house	£.	s.	d.
and premises in ——— Street, Westminster	25	10	0
Sept. 12. Ten sacks of flour at 40s.	20	0	0
Dec. 1. Money received by defendant	17	0	0
	<hr/>		
	62	10	0
<i>Paid</i>	15	0	0
	<hr/>		
<i>Balance due</i>	£47	10	0

Or,

<i>To butcher's meat supplied between the 1st of January,</i>	
<i>1849, and the 1st of January, 1850.</i>	£55
<i>Paid</i>	20
	<hr/>
<i>Balance</i>	£35

[*165] *If any account has been delivered, it may be referred to with its date, or the plaintiff may give such a description of his claim

(v) Ante, p. 160.

as in a particular of demand, so as to prevent the necessity of an application for further particulars.]

Or,

50*l.* principal and interest due on a bond dated the day of
conditioned for the payment of 100*l.*

Or,

90*l.* principal and interest due on a covenant contained in a deed
dated the day of to pay 100*l.* and interest.

Or,

A penalty of 100*l.* under the statute 55 Geo. 3, c. 137.

Or,

85*l.* on a bill of exchange for 100*l.* dated the 2nd February, 1849,
accepted, or drawn, or endorsed by the defendant.

Or,

50*l.* on a guarantee dated the 1st of January, 1850, whereby the de-
fendant guaranteed the due payment by E. F., of goods supplied or to
be supplied to him.

[To any of the above may be added, in cases where interest is payable,
"the plaintiff also claims interest on £ of the above sum from the
date of the writ until judgment."]

The following memorandum is to be added to the special indorsement:

N. B.—Take notice, that if a defendant served with this writ within
the jurisdiction of the court do not appear according to the exigency
thereof, the plaintiff will be at liberty to sign final judgment for any sum
not exceeding the sum above claimed [with interest at the rate specified],
and the sum of £ for costs, and issue execution at the expiration of
eight days from the last day for appearance.

In case of non-appearance by the defendant, where the writ of sum-
mons is indorsed in this especial form, the plaintiff, on filing an affidavit
of personal service of the writ of summons, or a judge's order for leave
to proceed under the provisions of this Act (the mode of obtaining which
shall be afterwards described in treating of the service of the writ), and a *copy of the writ of summons, may at once sign final judg- [*166]
ment, on which judgment no proceeding in error shall lie, for any sum
not exceeding the sum indorsed on the writ, together with interest at the
rate specified, if any, to the date of the judgment, and the sum for costs
fixed by a rule of court, (v) unless the plaintiff claim more than such fixed
sum, in which case the costs shall be taxed in the ordinary way (s. 27.)
Upon such judgment the plaintiff may issue execution at the expiration
of eight days from the last day for appearance, and not before; but the
court or a judge, either before or after final judgment, may let in the
defendant to defend upon an application, supported by satisfactory affi-
davits accounting for the non-appearance, and disclosing a defence upon
the merits (s. 27.) (w)

The final judgment upon a writ specially indorsed, it will be observed,
is only to be obtained in cases where the writ either has been served per-

(v) R. G. H. F. 1853. 1.

(w) Post. Chap. V., s. 2.

sonally, or leave obtained to proceed as if personal service had been effected. In the former case an affidavit of personal service, which I shall afterwards describe, in the latter the judge's order, must be filed on signing judgment.

The subject of execution being the last proceeding in an action, will be treated of in its natural course.

But it must here be remarked that if there has been no special indorsement of the writ, the plaintiff, in case of non-appearance by the defendant, must file a declaration according to the former practice, and thereon obtain judgment. If the cause of action was such as to have admitted of a special indorsement on the writ, the judgment is final, with *the costs of a special indorsement*. If, therefore, the special indorsement be not made in cases where it might have been made, the plaintiff, who by such omission renders a declaration necessary, will recover, if the action be undefended, no greater costs than if he had made the special indorsement and [*167] signed judgment on non-appearance (s. 28); the practical effect of the declaration.

There is only one other remark to be made regarding the special indorsement, viz., that it constitutes the particulars of demand in the action, and must therefore be framed with very great care. I shall have an opportunity, in a subsequent chapter, of referring to the subject of "particulars of demand."

At present I need only further mention that the great majority of writs issued from the superior courts are now specially indorsed, and, that on a very large proportion of these, final judgment is signed on the non-appearance of the defendant, without any pleadings or other proceedings whatever.

3. *Writ of Summons against British Subjects residing out of the Jurisdiction of the Court.*

The original writ from Chancery was directed to the sheriff of the county where the defendant was to be found. So was the *capias*, when actions were commenced in that way. When the modern proceeding by writ of summons was first introduced,^(x) again, it could only be served in the county named in it, or within two hundred yards of the boundary. This often led to delay and expense, from the necessity of issuing a fresh writ when the defendant was found to be in a different county; and the writ of summons may, consequently, now be served anywhere within the jurisdiction of the court out of which it is issued. A writ of summons may now also, however, be served on a defendant, wherever he resides abroad.

According to the ancient practice, as I have already pointed out, it was further necessary that the writ should be served on the defendant personally. In many cases, however, owing to the defendant keeping out of the way purposely, or to his being out of the jurisdiction, service was

(x) Ante, p. 145.

impossible, and the remedy was by a writ of *distringas*, *which issued in two cases; one to compel an appearance, after which the plaintiff might proceed; the other to ground proceedings to outlawry. [*168]

The *distringas* to compel appearance was an expensive and unsatisfactory process. It consisted of repeated distresses to the amount of 40*s.* on the defendant's goods, until he appeared to the writ. It is now abolished. In lieu of it, power is given to the court, or to a judge, on being satisfied that the writ has come to the knowledge of the defendant, and that he wilfully avoids appearing, to order that the plaintiff may proceed as if personal service had been effected: (s. 17.)

Outlawry, again, was a judgment pronounced for contumacy in the defendant, in neglecting to appear. It was pronounced after several processes, in which the defendant was called upon to appear, at five successive county courts, of the county into which the writ was issued, and where he was legally supposed, but positively known not, to reside. The consequence of the judgment was, that he forfeited to the crown his goods and his land, and became subject to other disabilities. These were got rid of by having the outlawry set aside or reversed. But if the defendant did neither, the plaintiff proceeded to cause crown process to issue, and the proceeds of any property the defendant had, might, after being seized by the crown, by a petition to the Lords of the Treasury, be made available in satisfaction of the debt. The outlaw might always set aside or reverse the proceedings without difficulty. He might set aside the outlawry on application to a judge at chambers, on paying the plaintiff's costs, and appearing to the writ of summons; or he might reverse it by writ of error, without paying the plaintiff's costs, and without entering an appearance to the action. The plaintiff had then no better remedy than to proceed to another judgment of outlawry, which might be reversed again and again, and so on for ever. These proceedings, so totally unworthy of, and so long a disgrace to, the jurisprudence of a country pretending to civilization, have been at last abolished (s. 24.)

*A writ of summons may now be issued against and be served upon a British subject resident abroad in any place except in Scotland or Ireland(y) (s. 18). The following is the form of the writ:— [*169]

Victoria, by the grace of God, &c.

To C. D., of _____, in the county of _____

We command you, that within [here insert a sufficient number of days within which the defendant might appear, with reference to the distance he may be at from England] days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance. [So on as ante, p. 157.]

(y) A Scottish plaintiff may sue an English defendant in the courts of Scotland if he has any property which can be attached *jurisdictionis fundandæ causa*, and the defendant may never know of the action, till he finds his property seized by a judgment creditor. An English creditor has no such remedy. He must now go to the Scottish courts, and this even if the debtor have all his property in this country; even after a judgment in Scotland he is helpless, for non-payment of the Scottish judgment cannot be held to be the breach of a contract made, or a cause of action arising within the jurisdiction of our courts.

The usual memorandum is to be subscribed on the writ, and it is to contain an indorsement, purporting that it is for service out of the jurisdiction of the Superior Courts in this form:—

This writ is for service out of the jurisdiction of the court, and was issued by E. F. of _____, attorney for the said plaintiff [or by an agent, as ante, p. 159.];

Or,

This writ, &c. &c., and was issued in person by A. B., who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such].

The indorsement as to the amount claimed should also be made on the writ. It should allow the defendant the time limited for appearance to pay the debt and costs, which time should be regulated by the distance from England of the place where the defendant is residing (s. 18).

[*170] Upon being satisfied by affidavit, *i. e.*, by an affidavit *of service, the nature and requisites of which are treated of afterwards:—

1. That there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction; and

2. Either that the writ was personally served upon the defendant,

Or, that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge; and,

3. Either that the defendant wilfully neglects to appear to such writ,

Or, that he is living out of the jurisdiction of the said courts, in order to defeat and delay his creditors:—

The court or a judge may direct that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions, as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case (s. 18).

There is no reason why a defendant, because he resides out of the jurisdiction, should deprive his creditor of the benefit of a judgment; and as the court will always take care that proceedings are not carried on to judgment, without the defendant having ample opportunity of defending himself, the power thus conferred is one not likely to produce injustice, or even hardship. Indeed there is one check on these proceedings expressly calculated to prevent the possibility of either, for the plaintiff is required to prove the amount of the debt or damages claimed by him in the action, either before a jury upon a writ of inquiry (if the action be for damages for a wrong not caused by him),—or before one of the Masters of the courts (if the plaintiff's claim be one in the nature of a debt or demand arising on account, or simple contract). The making such proof is a condition precedent to his obtaining judgment, which, when obtained, may be registered under the statutes 1 & 2 Vict. c. 110, and

3 & 4 Vict. c. 82, and in *this way made available against the defendant's property in this country (s. 18). [*171]

4. *The Writ of Summons against a Foreigner residing out of the Jurisdiction of the Court.*

A foreigner residing in this country enjoys the protection of our laws, and is therefore amenable to the jurisdiction of our courts. Formerly the only mode in which he could be sued in a personal action, if he resided beyond the jurisdiction of the court, was by proceeding to outlawry, as in the case of a British subject. These proceedings being abolished, foreigners may now be sued very much as British subjects residing abroad may be; for, in any action against a person residing out of the jurisdiction of the said courts, and not a British subject the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that, in lieu of the form of writ of summons appropriate to British subjects, the plaintiff may issue a writ of summons according to the form prescribed for foreigners, and serve a notice of such writ upon the defendant therein mentioned, which notice must be in the form prescribed, and which service will be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the court or a judge, upon their or his being satisfied by affidavit of the cause of action and otherwise, as in the case of British subjects, the like proceedings may be had and taken thereupon (s. 19).

The form of the writ where the defendant is not a British subject, and resides out of the jurisdiction, is as follows:—

Victoria, by the grace of God, &c.

To C. D., late of in the county of

We command you, that within [here insert a sufficient number of days within which the defendant might appear, with reference to the distance he may be at from England] days after notice of this writ is served on you, inclusive of the day of such service, you do cause an appearance, &c., &c., as in other cases.]

*The memorandum to be subscribed on the writ is in the usual form, and indorsements are to be made as in other cases. [*172]

Instead, however, of the defendant being served with a *copy* of the writ, he is to be served with a *notice* of it; this distinction arising from the fact that our Sovereign has no authority to command obedience from any one, except her own subjects. The *notice* is in this form:—

To G. H., late of [Brighton, in the county of Sussex], or now residing at [Paris, in France.]

Take notice, that A. B. of in the county of England, has commenced an action at law against you C. D., in Her Majesty's Court of Queen's Bench, [or Common Pleas, or Exchequer of Pleas], by a writ of that court, dated the day of A. D. 18 ; and you are required within days after the receipt of this notice, inclusive of

FEBRUARY, 1854.—9

the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said court to the said action; and in default of your so doing, the said A. B. may, by leave of the court or a judge, proceed thereon to judgment and execution.

[Here state the amount of the claim as in an ordinary writ, but allowing the defendant the time limited for appearance to pay debt and costs.]

(Signed) A. B., of &c.
or,
E. F., of &c.
Attorney for A. B.

This notice, it will be observed, affords precisely the same information, that a copy of the writ does in other cases. The procedure, which follows the service of it, is precisely the same as that on writs against British subjects residing abroad, only that the affidavit of service will specify the service of the notice instead of the copy of the writ.

The plaintiff must prove his claim in the same way, as the plaintiff suing a British subject must do. It is scarcely necessary to state, that a writ against a British subject or a foreigner residing abroad is prepared [*173] by the plaintiff, and sealed at the office of *the Court out of which it is to issue, on delivering a præcipe, precisely as in other cases.

This is a convenient opportunity for stating that affidavits of the service of the writ against British subjects, or of the notice to be served on foreigners, or of efforts to effect such service, which may sometimes constitute good service, so as to enable the plaintiff to proceed to judgment, may be made before a British consul (s. 23), or before any judge or magistrate of the place where the service is effected. In the case of a British consul, his signature and official character must be proved by another affidavit (s. 23), which can generally be obtained here at the Foreign Office; in the case of a foreign judge or magistrate, not only these, but also his authority to administer an oath must be proved.

5. Amendment of the Writ.

If the plaintiff omit to insert in or indorse on any writ or copy thereof, any of the matters required to be inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular, or amended, upon application to be made to the court out of which it issued, or to a judge. Such amendment may be made, upon any application to set aside the writ, upon such terms as to the court or judge may seem fit (s. 20).

The courts have hitherto amended process in two cases, first, where the penalty of the blunder would be so great as to amount to a loss of the entire debt; and secondly, where the writ by mistake varied from the præcipe.^(z) They amend, where the action would otherwise be barred by the Statute of Limitations, or to make the date of the writ to correspond

(z) Goodchild v. Leadham, 1 Ex. 706.

with the præcipe,(a) but the date will not be altered to save the statute, as the writ must bear the true date of its issue:(b)

The courts would not formerly allow an amendment *by the addition of a defendant,(c) but it may be otherwise now, for a [*174] defendant may be added after a plea in abatement.

The courts have refused hitherto to amend the copy of the writ, for this is the act of the party,(d) but the power of amending the copy is now expressly given. Misnomers have been amended hitherto by judge's order, "at the cost of the plaintiff."(e)

The application to set aside the writ may be made either to the court in term, or to a judge at chambers. It ought to be made within a reasonable time, ordinarily within the time allowed for appearing;(f) and it must be made before taking a fresh step, after knowledge of the irregularity.(g) It is not necessary to state the irregularity on which the party relies in applying for a rule nisi. It is sufficient if it appear upon the affidavit on which the rule is applied for, which must be filed in court, as we have seen, and is therefore open to the inspection of the opposite party. In the case of a summons at chambers, it is necessary to state the ground of application in the summons, because that is taken out without filing any affidavit, and the opposite party might be in entire ignorance of what he was called upon to answer, if it were not stated in the copy of the summons served on him.(h) If the irregularity is in the writ, the plaintiff will be obliged to amend it, and probably to get it resealed, and serve it afresh.

CHAPTER IV.

SERVICE OF THE WRIT.

THE mode in which the defendant is made acquainted with the nature and amount of the plaintiff's claim *upon him is, as we have [*175] seen, by the service of the writ.

1. *Service on Defendants residing within the Jurisdiction.*

Within six months of its date, the writ should be served on the defendant. If it cannot be served within that time, it may be renewed by being resealed at the office of the court from which it issued, and so it may be renewed from time to time until service is effected (s. 11); while if there are several defendants residing in different parts of the country, and despatch is required, concurrent original writs may be issued (s. 9) in order that there may be no delay.

(a) *Kirk v. Dolby*, 6 M. & W. 636.

(b) *Campbell v. Smart*, 5 C. B. 190.

(c) *Eccles v. Cole*, 8 M. & W. 537.

(f) *Tilling v. Hodgson*, 13 M. & W. 638.

(h) *Bennie v. Bruce*, 2 D. & L. 946.

(e) *Roberts v. Bate*, 6 A. & E. 778.

(g) *Rush v. Kennedy*, 7 Dowl. 199.

(s) R. G. H. T. 1853, 185.

Service may be effected by the plaintiff himself, his attorney, or any other person whom he appoints, delivering a copy of the writ (at the same time showing the original, if a sight of it be demanded) to the defendant at any place where he can find him (ss. 14, 17).

The service ought always, if practicable, to be personal, and to be made by some one who knows the defendant and can swear to his identity. A writ cannot be served when the defendant is attending a court of justice. (a) As a general rule there is no equivalent for personal service, (b) except an undertaking by an attorney to appear, which will be enforced by attachment. (c)

If the defendant keeps out of the way so that personal service cannot be effected, the plaintiff must then use reasonable efforts to do so; for if he can satisfy the court or a judge by an affidavit that such efforts have been made and either—

1. That the writ has come to the defendant's knowledge;

Or that he wilfully evades service of it; and,

2. That he has not appeared to the writ;—the plaintiff may obtain a rule from the court or an order *from the judge authorizing him [176] to proceed as if personal service had been effected (s. 17).

The efforts hitherto considered reasonable have consisted of three separate calls at the defendant's residence on different days, the nature of the business having been mentioned on each occasion, and notice given of the next call. On the last call the copy of the writ was generally left. On this subject the decisions are extremely numerous; but it is evident that the facts to show that efforts have been made, and that the writ has come to the knowledge of the defendant, must depend on the circumstances of each particular case, as must also those from which can be derived the conclusion that the defendant evades service. Where it can be shown that he is aware of the writ, and merely avoids service, the requirements as to the efforts to be made to effect service are not insisted on. (d) Where the defendant had corresponded with the plaintiff's attorney, as to a compromise of the action for instance his knowledge of the writ was considered unquestionable. (e)

The fact of no appearance having been entered for the defendant, may be stated in the same affidavit as the attempts to effect service, or in a separate affidavit. A search for an appearance, in the book kept for entering appearances at the office of the court, must be made before any application for leave to proceed, as if service had been effected. It should appear to have been made, if possible, on the day on which the application for leave to proceed is made. (f).

The application, "that the plaintiff be at liberty to proceed as if personal service had been effected," cannot be made until after the lapse of eight days from the last attempt to serve the defendant, (g) nor must it be delayed for an unreasonable time. (h)

(a) *Cole v. Hawkins*, 2 Stra. 1094.

(b) *Russell v. Lowe*, 2 Dowl. N. S. 233.

(c) *R. G. H. T.* 1853, 3.

(d) *Wilkins v. Jones*, 15 L. J. R. 226; C. B.

(e) *Godinage v. Terrewest*, 20 L. J. R. 209; Q. B.

(f) *Spence v. Barker*, 8 Dowl. 296.

(g) *Brian v. Stretton*, 1 Dowl. 642.

(h) *Bromage v. Ray*, 9 Dowl. 599.

A rule or judge's order granting leave to proceed *will not be set aside on affidavits merely contradicting that, on which the [*177] rule or order was obtained.(i)

Where the defendant is a corporation aggregate, the service must be on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary. A writ against the inhabitants of a hundred is to be served on the high constable; against the inhabitants of any county of a city or town, or of any franchise, liberty, city, town, or place, not being part of a hundred or other like district, on some peace-officer thereof (s. 16).

As to public companies, the Companies' Clauses Consolidation Act (8 Vict. c. 16, s. 135) provides that service on the secretary shall be sufficient.(k)

With reference to trading companies, service on the *clerk*, or at the head office for the time being of the company, or in case such clerk shall not be found or known, service on any agent or officer employed by the company, or by leaving the same at the usual place of abode of such agent or officer, is good and sufficient service on the company.(l)

Service may be on the *secretary* of a joint-stock company, completely registered under 7 & 8 Vict. c. 110 (s. 16.)

In any action against any printer, publisher, or proprietor of any newspaper, service at the house or place mentioned in the declaration of such printer, &c., as the house or place at which such newspaper is printed or published, is good and sufficient service upon any person named in such declaration as printer, publisher, or proprietor of the newspaper therein mentioned.(m)

The above observations as to the service of the writ of summons apply, of course, to a renewed or concurrent writ, and generally to all notices used or required to be given in the course of the proceedings in an action.

*2. *Service on Defendants residing Abroad.* [*178]

I have pointed out, in Section 3 of the preceding chapter, what is required before a plaintiff can obtain leave to proceed against a defendant residing abroad. I may here call the reader's attention to a distinction that exists, however, in reference to the service of writs at home and abroad. In either case the service ought, if possible, to be personal; but if personal service cannot be effected, the plaintiff will obtain leave to proceed against a defendant residing *within* the jurisdiction, on showing that reasonable efforts have been made to effect service, and that the *defendant evades service*. But in order to obtain such leave where the defendant *resides abroad*, he must not only show that such efforts have

(i) Whittaker v. Crocker, 2 L. M. & P. 76.

(k) Wilson v. Caledonian Railway Company, 5 Ex. 822.

(l) 7 Will. IV. & 1 Vict. c. 73, s. 26. Weldon v. Universal Salvage Company, 16 M. & W. 438; 4 D. & L. 450.

(m) 6 & 7 Will. IV. c. 76, s. 9.

ant, with a true copy of a writ of summons, which appeared to this deponent to have been regularly issued out, and under the seal, of this honourable court, at the suit of the above-named *plaintiff, [*180] against the above-named defendant, and dated the day of

A. D. 18 . To which said writ and copy a memorandum was subscribed, and on which said writ and copy indorsements were made according to the Common Law Procedure Act, 1852, a true copy of which writ, and of the memorandum thereto, and several indorsements thereon, is hereunto annexed, marked A. [annex it.] And this deponent further saith, that he did afterwards, and within three days of such service, that is to say, on the day of the said month of indorse on the said writ the day of the month and week of such service, according to the said Common Law Procedure Act, 1852.

Sworn, &c.

J. P.

This affidavit may be sworn before the court, or before a judge or a commissioner for taking affidavits, but cannot be made before the plaintiff's attorney or his clerk, nor before the attorney in the country if his agent in town is the attorney on the record.(v) It ought to state that the writ and indorsements are regular,(w) and a copy of the writ should always be annexed to it.

CHAPTER V.

JUDGMENT BY DEFAULT.

UPON the regular service of the writ of summons, the next step ordinarily taken in a defended action is by the defendant, viz., to enter an appearance to the action, in the office of the court, out of which the writ issues. In most actions there is, however, no defence; and the next step in such a case is one to be taken by the plaintiff, viz., to sign judgment by default. It will be more convenient, before proceeding to describe the proceedings in a defended action, to dispose of an action to which no appearance *is entered; and to mention again, under [*181] this head, the further steps of procedure which take place in actions, against persons resident beyond the jurisdiction of the court, and which are undefended.

I have already stated that by the ancient practice of the courts no judgment could be given against a defendant, until he had not only appeared, but the plaintiff declared, i. e. stated in his first pleading or declaration, the nature of his cause of action, and the amount of his demand. I have also pointed out, how the plaintiff was afterwards permitted to enter an appearance for the defendant, that he might declare against him, and on the defendant's failure to plead to the declaration, obtain judgment, on the ground that the claim or demand of the plaintiff being unan-

(*) B. G. H. T. 1853, 142, 143.

(w) Wakeley v. Teesdale, 2 L. M. & P. 85.

answered. The judgment thus signed by the plaintiff, on the defendant's failure to plead, was formerly in all cases except one, interlocutory.

In an action of debt, the nature of which has been already explained,^(a) the judgment was always^(b) final for the debt claimed in the declaration. Execution on the judgment issued at once, it being the plaintiff's duty to indorse the real amount of the debt on the writ of execution; for the declaration generally claimed, and still often claims, the same debt in six or seven different shapes.^(c)

In every other form of action, an interlocutory judgment only was signed, for the plaintiff therein claimed damages, as in *covenant* for the breach of a covenant, or in *assumpsit* for non-payment of a bill, or non-performance of a guarantee. The amount of the damages to which the plaintiff was entitled remained to be ascertained by a jury on a writ of [*182] **inquiry*;^(d) or by a rule to compute, or reference to one of the masters of the court; this being allowed only in cases of demands liquidated by a written contract.

In the majority of cases in which this proceeding by rule was resorted to, the action of *debt* was maintainable, and was less expensive. In some cases the most expensive form of *covenant* was adopted by plaintiffs, instead of *debt*, as to recover a sum secured by deed.

In cases where the rule to compute was inapplicable, a jury was summoned, under a writ of inquiry, to assess the damages.^(e)

The formality of the plaintiff's entering an appearance for the defendant is now abolished, and in all actions in which the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default is final (ss. 93, 95.)

A plaintiff in *assumpsit* and *covenant* will now, instead of interlocutory, sign final judgment, as formerly every plaintiff did, in *debt*.

In other cases than those in which a "debt or liquidated demand in money," is sued for, that is to say, in actions for damages, interlocutory judgment will be signed; and the amount for which final judgment is to be afterwards signed, ascertained either by a writ of inquiry, or a reference to one of the masters of the court.

1. *Judgment by default on non-appearance.*

Where personal service of the writ has been effected, the defendant ought to enter an appearance at the office of the court named in the writ, within the eight days therein limited; if he do not, the plaintiff on filing an affidavit of service, will be at liberty to sign judgment against him.^(f)

(a) Ante, p. 116.

(b) Except in some few cases, as for treble value for not letting out tithes, or where the debt was made payable in foreign money.

(c) The circumstance of a plaintiff being permitted to issue execution for an amount arbitrarily fixed by himself would, it may be thought, lead to abuse and oppression; but in practice it is not so; for the consequence of suing out execution for more than is due, are so much to be avoided, that the utmost possible care is invariably taken to confine the indorsement on the writ to the true amount of the debt.

(d) Ante, p. 44.

(e) Ibid.

(f) The meaning of the term *signing judgment* has been already explained, ante, p. 74.

If personal service of the writ has not been effected, but the plaintiff has obtained an order of a judge to proceed *as if such service had been effected, (g) he may, on filing such order, sign judgment [*183] (s. 27).

This judgment is either *final* or *interlocutory*. In all cases in which the writ may be specially indorsed, (h) the judgment will be final. In actions, also, in which, although the writ has not been specially endorsed, the plaintiff's demand is yet one, which might have been specially indorsed on the writ, the judgment will be final. (i) And the same final judgment may be signed in other cases in the course of the action; as, by nil dictit, that is, that "the defendant says nothing," or, less technically, for want of a plea, rejoinder, or other pleading by the defendant.

In actions, again, in which the plaintiff seeks to recover unliquidated damages, as in cases of assault, crim. con., slander, trespass, &c., the judgment by default will be *interlocutory*. (k)

To prevent any hardship being sustained by the defendant, he will be allowed to appear and defend the action upon accounting for his non-appearance, and swearing to a defence on the merits (s. 27).

2. Appearance on Affidavit of Merits.

It has long been a matter of course to let in a defendant to defend on an affidavit of merits, (l) but the defence must be on *the merits*. A plea of the Statute of Limitations, (m) or of a discharge under a Bankruptcy, (n) or of Infancy, (o) are each of them defences *on the merits* within this rule. A plea to an action by an attorney that no bill was delivered, will probably be held a plea to the merits. (p)

*The defendant must account in some way for not having entered an appearance; he must also generally pay the costs of [*184] the application; and as he is obtaining an interference of the court on his behalf calculated to delay the plaintiff, it is generally made a condition of the rule or order, that he shall plead on the same day, and in certain cases he may be ordered to bring money into court. (q)

In applications by defendants to be let in to defend, the courts very strictly require, that it be stated in express terms in the affidavit on which the motion is made, or summons applied for, that there is a "good defence on the merits."

3. Judgment by Nil dictit.

I have already pointed out that if the writ, to which no appearance is

(g) Ante, p. 175.

(h) Ante, p. 165.

(i) Ante, p. 166.

(k) There are other occasions on which, as already stated, a judgment will be interlocutory, as for, instance, in the case of a judgment for the plaintiff on a denurrer, or plea of nul tiel record, but at present we are confined to the subject of judgments in default of appearance to the writ.

(l) *Listed v. Lee*, 1 Salk. 402.

(m) *Maddock v. Holmes*, 1 B. & P. 228.

(n) *Evans v. Gill*, 1 B. & P. 52.

(o) *Delafield v. Tanner*, 5 Taunt. 856; 1 Marsh. 391.

(p) *Wilkinson v. Page*, 1 D. & L. 913.

(q) *Wade v. Simeon*, 13 M. & W. 637.

made, has been specially indorsed, the judgment is final, and execution may issue in eight days afterwards for the debt and costs (s. 27). If the writ has not been specially indorsed, the plaintiff must file a declaration, accompanied by the "particulars of demand" (of which we have seen a special indorsement on the writ supplies the place;) and if no plea be delivered within eight days afterwards, he may sign final judgment for the debt and the costs allowed on judgments on default of appearance to writs specially indorsed; for the costs of the declaration are not allowed in cases, where the writ might have been specially indorsed (s. 28).

Where *damages* are sought to be recovered, the writ cannot be specially indorsed, and the first judgment is interlocutory. There must then either be a writ of inquiry to assess the damages, for which final judgment is to be given; or, if the plaintiff's claim is substantially a matter of calculation, the court or a judge will refer it to one of the masters to compute that amount (s. 24).

4. *Writ of Inquiry.*

I have already described generally the nature of a Writ of Inquiry, [*185] and the circumstances in which it issues.^(r) It is a judicial writ issuing in the name of the Queen, directed generally to the Sheriff of the county in which the venue in the action was laid, tested in the name of the Chief Justice or Chief Baron of the court. It recites the judgment recovered against the defendant, and then proceeds:—

"But because it is unknown to our said Court what damages the said A. B. [plaintiff] hath sustained by reason of the premises aforesaid, therefore we command you that by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what damages the said A. B. [plaintiff] hath sustained, as well by means of the premises aforesaid as for his costs and charges by him about his suit in this behalf expended, and that you send [in Q. B.] to Us [in C. B., to Our Justices, or in Ex. to the Barons of Our Exchequer] at Westminster, on the day of now next ensuing the inquisition which you shall thereupon take under your seal, and the seals of those by whose oath you shall take that inquisition, together with this writ. Witness, &c."

A jury being summoned by the sheriff,^(s) the plaintiff's damages are proved as in ordinary cases, the amount of them being the only question for the jury to determine. The proceedings previous to, and at the trial, ought to be precisely the same as those in an ordinary action. After the jury have assessed the damages, their verdict, instead of being entered on the record as is done in ordinary actions, is extended on a separate parchment, which is called an "Inquisition," which, being sealed by the sheriff and the twelve jurors, is attached to the writ,

^(r) Ante, p. 45.

^(s) If the writ be directed to a Judge of Assize, it is executed before the jury-men summoned for the assizes.

and with it sent back to the court from which the writ issued, with this return indorsed on the writ :

The execution in this writ appears in the inquisition herewith annexed.

The answer of X. X., Sheriff.

Upon the return of the writ, final judgment is signed, and execution issued, unless delay be obtained in the way I have already pointed out.^(t)

**5. Inquiry before the Master.*

[*186]

In actions in which the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it is unnecessary to issue a writ of inquiry, for the court (by a rule), or a judge (by an order at chambers), may direct that the amount for which final judgment is to be signed, shall be ascertained by one of the masters of the court (s. 94).

We have also seen that in every action brought against a person residing abroad, there must, if it be undefended, be an inquiry either before a jury, upon a writ of inquiry, or an inquiry before the master, as to the amount of the debt or damages claimed by the plaintiff (s. 18).

A writ of inquiry will be issued in an undefended action against a person residing abroad, in all cases in which that mode of proceeding is proper, in undefended actions against persons, residing within the jurisdiction of the courts, that is in all cases in which damages, not a matter of calculation merely, are sought to be recovered. On the other hand, in those actions in which the plaintiff sues a defendant residing abroad, for "debt or liquidated demand in money," or in which the damages are "substantially, a matter of calculation," the inquiry will, by a rule of court, or a judge's order, be directed to take place before one of the masters.

It was the practice formerly, when the first judgment was interlocutory, to refer to the master the computation of the amount for which final judgment was to be signed, in actions on bills, notes, cheques, or awards, and in actions of covenant for rent, or for the amount of a mortgage, or the arrears of an annuity.

In such actions the writ may now, when the defendant is within the jurisdiction, be specially indorsed. If he resides out of the jurisdiction, there must be an inquiry before the master.

A reference to the master was not ordered, according to the former practice, where the action was for an *uncertain sum, not a mere matter of figures, as on a foreign judgment, a bill of exchange [*187] for foreign money, or in an action for railway calls. But in an action on a foreign judgment, or on a foreign bill of exchange, the damages are generally substantially a matter of calculation, and the damages in

(t) Ante p. 46.

an action for railway calls would also seem to be substantially a matter of calculation; so that in these and similar actions the inquiry will probably now be by the master.

This proceeding before the master comes in place (in those actions to which it is applicable) of the writ of inquiry formerly in use; accordingly the attendance of witnesses and the production of documents before the master may be compelled by subpoena, in the same manner as before a jury upon a writ of inquiry. The master may also adjourn the inquiry from time to time, as occasion may require. He endorses upon the rule or order for referring the amount of damages to him, the amount found by him, and delivers the rule or order, with such indorsement, to the plaintiff. The like proceedings may thereupon be had as to taxation of costs, signing judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry (s. 94).

It would seem, therefore, that an interlocutory judgment only will be signed in cases in which the inquiry is to take place before the master; and though there are several defendants and several interlocutory judgments, there must be but one reference,^(u) which may be applied for on the same day that judgment is signed.^(v)

[*188]

*CHAPTER VI.

APPEARANCE AND STATEMENT OF QUESTIONS WITHOUT PLEADINGS.

1. *Appearance of the Defendant.*

A DEFENDANT, intending to contest the claim of the plaintiff, ought to enter an appearance within the time limited by the writ, and at the office of the court out of which the writ issues, by delivering to the proper officer a memorandum in writing according to the following form, or to the like effect:—

<p>A. B., [plaintiff, <i>against</i> C. D., [defendant.]</p>	<p>{ <i>The defendant, C. D., appears in person, or R. G. attorney for C. D. appears for him.</i></p>
<p>[If the defendant appears in person, here give his address.]</p>	
<p><i>Entered the</i></p>	<p><i>day of</i> , 18 .</p>

This memorandum must be dated on the day of the delivery thereof (s. 81).

We have seen that if the defendant does not appear, the plaintiff may sign judgment against him. If he does appear, the appearance must be strictly in the form prescribed; for an appearance which is not so,

(u) Field v. Pooley, 3 M. & G. 756.

(v) Russen v. Hayward, 5 B. & Ald. 752.

will be set aside as irregular.(a) If the defendant is described in the writ by initials, or by a wrong name, the appearance should be entered in his true name; as thus, "William Wells Kilpin, sued as W. W. Kilpin;"(b) and if an appearance be entered which is irregular, it ought to be amended: a new appearance would itself be irregular.(c)

Although he ought to appear within eight days after service of the writ, the defendant may appear *at any time before judgment is actually signed by the plaintiff; and if he appear after the time [*189] specified, he will, provided he give the plaintiff a notice of such appearance, be in the same position as if he had appeared in proper time. But a defendant appearing after the time appointed by the writ, is not entitled to any further time for pleading than if he had appeared within the appointed time (s. 29.) Consequently, should the time for pleading have expired, or nearly expired, the defendant should apply to a judge at chambers for further time to plead, if he requires such indulgence.

We have seen that every attorney must have a registered office, at which all pleadings, notices, and other proceedings may be left for, or served upon him. On the same principle, viz., that suitors may not be delayed, every person who defends *in person*, that is, without the intervention of an attorney, must, in his appearance, give an address at which all pleadings and other proceedings not requiring personal service may be left for him. If such address be not given, the appearance will not be received at the office of the court; and if an address so given be illusory or fictitious, the appearance will be irregular and may be set aside, and the plaintiff permitted to proceed by sticking up the proceeding in the master's office without further service (s. 30).

Upon the appearance of the defendant, both parties are, according to the theory of the proceedings, in the presence of the court. The writ of summons is returnable as soon as it is executed, and the plaintiff is in court at the return. The defendant is in court by his appearance. The plaintiff ought now to "count," or to declare to the judges, what are the causes of action, for which he has thus brought the defendant before them, that they may give the proper legal redress, which the Sovereign, by the original writ, formerly, and now by the writ of summons (theoretically,) commands them to do.

Anciently the counting of the plaintiff and the pleading of the defendant were, as we have seen, *ore tenus*. That practice soon gave way to the production *by the parties of written pleadings, which were [*190] entered at the time on the records by the prothonotaries of the court. This innovation, in its turn, was supplanted by the modern system by which all the proceedings in an action are simply interchanged between the attorneys, and only solemnly entered on record, should it become necessary to do so.(d)

(a) *Smith v. Wedderburn*, 4 D. & L. 297. (b) *Lomax v. Kilpin*, 4 D. & L. 295.

(c) *Bate v. Bolton*, 4 Dowl. 160, 677.

(d) The reader will find a brief account of the system of recording in the Superior Courts in the "Law Magazine" for November, 1853.

2. *Statement of Questions without Pleadings.*

In the next Chapter I shall mention of what these pleadings consist; but there is a course open to the defendant, even before appearance, if he chooses to adopt it, which may render these pleadings altogether unnecessary. The object of all pleading is, as we shall see afterwards, to eliminate and ascertain what is in issue between the parties to the action; whether they disagree on a matter of *fact* or a matter of *law*. If the parties can ascertain this without pleadings, there is clearly no reason why these should be restored to. The defendant is, therefore, now allowed to take the shortest and simplest mode of stating the question at issue between himself and the plaintiff, for the decision of the proper tribunal. For if it be a question of *fact*, it must be determined by a jury, if of *law*, by the court.

Where the parties are agreed as to the question or questions of fact to be decided between them, they may, after writ issued, and before judgment, by consent and order of a judge, proceed to the trial of any question or questions of fact without pleadings (s. 42).

This necessary preliminary—the judge's order—is obtainable at chambers, and may be made by any judge upon his being satisfied that the parties have a bona fide interest in the decision of such question or questions, and that the same is or are fit to be tried. In a recent case^(c) [*191] where, in the opinion of the court, *the parties merely wished to allay a doubt as to the true construction of a will, the Court of Common Pleas declined to give any opinion. In that case it appears that the parties had a bona fide interest in allaying the doubt, but what amount of interest will satisfy the proviso in this section it is difficult to determine. But if the order can be obtained, the question or questions may be stated for trial in an issue in the following form:—

In the Queen's Bench:

The day of , in the the year of our Lord 18 .
Yorkshire, } Whereas A. B. has sued C. D., and A. B. affirms and C.
to wit. } D. denies.

[Here state the question or questions of fact to be tried.]

And it has been ordered by the Hon. Mr. Justice , according to "The Common Law Procedure Act, 1852," that the said question shall be tried by a jury: therefore let the same be tried accordingly.

The issue is entered for trial and tried at the sittings or assizes, in the same manner as any issue joined in an ordinary action; and the whole proceeding, which may be recorded at the instance of either party (s. 45), are subject to the control of the court, as in other actions (s. 42).

When a plaintiff resorts to legal proceedings it is generally to obtain

(c) Doe dem. Duntze, 8 C. B. 100.

or recover a sum of money which the defendant refuses to admit the plaintiff's right to demand or receive. In contemplation of this, the usual state of things, the parties are allowed, if they think fit, to enter into an agreement in writing, which if made, must be embodied in the judge's order, that upon the finding of the jury a sum of money fixed by the parties, to be ascertained by the jury upon the question inserted in the issue for that purpose, shall be paid by one of such parties to the other of them, either with or without the costs of the action (s. 43). In this way the parties may either reduce the sum in dispute to figures before trial, or leave the question open for the jury, upon whose verdict judgment may be entered up, and execution issued forthwith, unless otherwise agreed, or unless the court or a *judge shall otherwise order for the purpose of giving either party an [*192] opportunity for moving to set aside the verdict for a new trial (s. 44).

But the parties may not be at issue on any matters of fact, but, on the contrary, agreed upon the facts, differing as to the *law* arising therefrom. If this be so, they may, by consent and order of a judge (as in the case of issues in fact,) state any question or questions of law, in a special case, for the opinion of the court (s. 46).

This special case should be confined to questions of *law*; for if matters of fact appear to be in issue, the court will leave the parties to go to a jury.(f)

In the same way, also, as in the case of an issue for trial by a jury, the parties may enter into an agreement, that, according as is given the judgment of the court, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of such parties to the other of them, either with or without costs of the action.

It may be added, that in case no agreement is entered into as to the costs, these follow the event, and are recovered by the successful party.

CHAPTER VII.

THE PLEADINGS.

PLEADINGS are the mutual altercations between the "plaintiff and defendant, which * * * * formerly were usually put in by their council "ore tenus, or viva voce, in court, and then minuted down by the chief "clerks or prothonotaries; whence in our old French law, the pleadings "are frequently denominated the *parol*."

At present they are delivered in writing by the *attorney of one party to the attorney of the other, within certain stated [*193] periods of time, and are never seen by the court at all, unless in the case of a demurrer, or of certain proceedings which may occur after the

(f) Aldridge v. Great Western Railway Company, 3 M. & G. 515; Price v. Quarrel, 12 A. & E. 784.

trial at nisi prius, and which will be described in their proper place. A pleading may, however, be seen by the court, or a judge, on a motion being made, or a summons taken out at chambers, to set it aside, or to have it amended by the party pleading it, which he ought not to do in a manner which is open to objection.

1. *The Object of the Pleadings.*

The object of pleading is to ascertain the matters really in controversy between the parties to the action, so as to avoid all discussion and inquiry on those which are not. To accomplish this, the plaintiff first states the facts constituting his cause of complaint; the defendant in answering is compelled either to deny or traverse the facts alleged by the plaintiff; or, confessing the facts to be true, avoid their legal effect by asserting a fresh fact; or, still admitting them, to deny the legal effect which the plaintiff asserts arises from them.^(a) The plaintiff, if the defendant asserts a fresh fact, must reply according to the same rule, and if necessary the defendant rejoins. Thus the parties are allowed to proceed, till some fact is asserted by one side and denied by the other, or some proposition of law is affirmed on the one hand and denied on the other, when the parties are said to be *at issue*, at the end of their pleading; the questions thus raised being issues *in fact*, or issues *in law*, as the case may be.

Such is the ground work of the system of pleading in the courts of common law, and it possesses obviously many advantages. The parties are not taken by surprise, they know the precise point of dispute, and [*194] as questions of fact are determined by a jury, *and questions of law by the court, each of these questions is kept distinct, and each referred to the proper tribunal for its determination. Had such been the practical results of the system, it would have been entitled to admiration for its simplicity, and to gratitude for its usefulness; but defects and abuses have been periodically engrafted on it, which have necessitated frequent interferences, both by the legislature and by the judges. Some idea, but a very faint one, may be formed, of the manipulation to which the whole system has been subjected, by a perusal of what has been already said on the one subject of amendment alone. To detail the changes which have taken place from time to time would be to write a History of the Law of England. I therefore content myself with repeating what I have already had occasion to state, that the present system of pleading is formed partly out of the Common Law Procedure Act, 1852, and partly out of the Rules and Orders of Hilary and Trinity Terms, 1853.

The essential and leading principles of the system have been preserved through all the changes, however; and at the present moment the student will do better to read the Year Books than the verbose, laboured, and mystical disquisitions of more recent times. Indeed, both Sir Mat-

(a) By leave of the court or a judge, a defendant may do both, that is he may plead and demur together; but that doing so is the exception and not the rule.

thew Hale and Sir Edward Coke consider the reign of Edward III. the period when pleading had attained its highest point of excellence.

That the parties to the action may be compelled by the mere effect of their own allegations, to agree upon the question or questions for decision, a series of dicta have been from time to time pronounced by the courts which were for the first time collected and systematized by Mr. Sergeant Stephen—now a Commissioner in Bankruptcy, at Bristol—in his admirable work on the Principles of Pleading. Any attempt to enumerate these different rules, or explain the practical effect of them, would be much beyond the limits of a compilation like the present, in which it is intended only to point out what the various pleadings now in use are—not how they ought, and *are to be framed consistently with numerous technical rules, a familiarity with which can only [*195] be obtained by a close study of the science of pleading itself.

The leading rule, in fact the very foundation of the system, I have already pointed out, viz., that at each stage the party must deny the fact stated in the pleading of his opponent, or else confess it, and at the same time avoid the effect of the admission, by alleging either a fresh fact in reply, or the insufficiency in law of the fact admitted, as an answer to the previous averment. Thus to the declaration of the plaintiff in an action of debt on bond, in which the plaintiff avers that the defendant, *by deed*, covenanted to pay to him a certain sum, the defendant may plead *that the alleged deed is not his deed*, which is a plea in denial, or traverse of the plaintiff's averment in his declaration that the defendant, *by deed*, covenanted to pay him the sum claimed; or he may plead in confession and avoidance, i. e., he may confess the fact of having granted the bond, but avoid the legal effect of that admission by pleading, "*that after the alleged claim accrued, and before this action, the plaintiff, by deed, released the defendant therefrom.*" Now the plaintiff has either released the defendant, or he has not. If he has not done so, he may answer the defendant's plea by a replication, that "*he joins issue on the defendant's plea,*" which is a traverse of the defendant's averment of the release; or he may confess and void that plea, by a replication, "*that the alleged release was procured by the fraud of the defendant;*" to which the defendant may rejoin, by joining issue on the replication, which is a denial of the alleged fraud.

In either case the parties are at issue. In the first instance, on the *fact* of the deed being the defendant's deed; in the second instance, on the *fact* of the release having been obtained by fraud. It is for the jury, on hearing the evidence, to determine whether the deed is the defendant's, or whether the facts proved to them constitute fraud in obtaining the release.

But let us suppose the defendant to have pleaded *a plea to the effect that after the plaintiff's claim accrued to him he the plain- [*196] tiff became indebted to the defendant, which debt the defendant was willing to set off against the plaintiff's claim, and the facts to be as stated in the plea. In this case the plaintiff, it is evident, cannot traverse the fact of his having become indebted to the defendant: nor can

FEBRUARY, 1864.—10

he avoid the effect of that admission in any way. He is, therefore, driven to demur; which he does, by averring *that the plea is bad in substance*; on which the defendant may join in demurrer, by rejoicing that the plea "is good in substance." This is an issue in law for the court. How it is submitted for their determination, I shall point out afterwards. If a set-off arising *after* action be a good plea in an action of debt on a bond, which it is not,^(s) the judgment will be for the defendant. If it be an insufficient answer, the judgment will be for the plaintiff. And here I may observe, that any good defence arising to a defendant after action brought it may be pleaded in proper terms; in which case the plaintiff may reply by confessing the plea, and praying judgment for his costs of suit, to which, in this case he is entitled by, the law.^(a)

The reader will thus observe that the pleadings in an ordinary action consist of the declaration, or statement of the plaintiff's claim; the plea, or the defendant's answer to the action; the replication, or reply of the plaintiff; the rejoinder, or defendant's answer to the replication. There are three further stages of pleading, to which in very few actions, however, the parties arrive, called the sur-rejoinder, and rebutter, and the sur-rebutter. The pleadings may even be carried further; but beyond the sur-rebutter they have no distinctive appellation. At any stage either the party may demur, and the other must then join in demurrer; but to this proceeding I shall have occasion to call attention afterwards.

[*197]

*2. *The Requisites of Pleadings.*

I shall now mention what are the essentials of all pleadings.

"The law," says Lord Chief Justice Hobart, in *Colt v. The Bishop of Coventry* (Hob. Rep. 164,) "requires in every plea two things,—the one, that it be in matter sufficient; the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is the cause of demurrer." And such was the law till the Common Law Procedure Act abolished demurrers for the second cause, assigned by the Chief Justice, want of form (s. 51); and laid down what may be termed the present law on this subject. For now, while either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be, yet no judgment shall be arrested, stayed, or reversed for any imperfection, omission, defect in or lack of form (s. 50).

All pleadings, then, "must be in matter sufficient," otherwise they may be demurred to: The nature and requisites of a demurrer, and the manner in which it is determined, will be considered in a subsequent Chapter.

All pleadings must also "be deduced and expressed according to the forms of law." Now a pleading may be deduced according to the forms

(s) *Richards v. James*, 2 Ex. 471.

(a) R. G. T. T. 1853, 22.

of law, and yet be also calculated to embarrass or mislead the other party without being open to a demurrer. So a pleading may be in matter sufficient, and yet not be expressed "according to the forms of law." It is therefore necessary that I should point out :—

First ;—The remedy which the party has, when his opponent pleads in a way calculated to embarrass or mislead him, without thereby rendering the pleading demurrable; and

Secondly ;—What are the forms of pleadings, and what is the mode in which the parties are compelled *to express them "according [*198] to the forms of law."

3. *Striking out and Amending Pleadings.*

If a pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend it, and the court or any judge may make such order respecting it, and also respecting the costs of the application, as such court or judge shall see fit (s. 52).

It has always been in theory one of the rules, if not one of the results, of our system of pleading, that no pleading should be framed to prejudice, embarrass, or delay. There are several circumstances in which the courts allow the plaintiff to sign judgment as for want of a plea—cases in which, in fact, an attempt is made to embarrass and delay. This has been known as *sham pleading*; and formerly, for this purpose, the plea of judgment recovered was universally restored to. I have pointed out the nature of this plea in a previous page,(b) and I have now only to add, that when pleaded, it must be accompanied by a statement of the date of the judgment and its number on the roll,(c) so that its *truth* is capable of being immediately ascertained.

For all pleadings ought to be true. A pleading false on the face of it may be treated as a nullity. Thus, where the plaintiff declared on two bills of exchange, due 5th and 6th December, and the defendant pleaded a judgment recovered in an action brought on the bills, in Michaelmas Term *preceding* these dates, the plaintiff was considered right in signing judgment.(d) But unless the inference of falsity be irresistible, the plaintiff should not sign judgment. He should apply to set aside the plea,(e) and the application should be founded on an affidavit *of [*199] its falsity;(f) though if this be explained or denied on the other side, the court will not take the place of a jury, and try the truth of the plea on affidavits.

On the same principle that a plea, palpably false, will be set aside, so will a palpably *sham* plea, and this without an affidavit of falsehood. Where the defendant pleaded a judgment recovered in the court of Piepoudre, in Bartholomew Fair, in terms palpably fictitious, the court allowed the plaintiff to sign judgment.(g)

Where the plea was so ingeniously prepared that it was likely to occa-

(b) Ante, p. 99.

(d) Vere v. Carden, 5 Bing. 413.

(f) Young v. Gadderer, 1 Bing. 380.

(c) R. G. H. T. 1853, 10.

(e) Bell v. Alexander, 6 M. & Sel. 133.

(g) Blewitt v. Marsden, 10 East, 237.

sion peplexity, it was set aside.(k) So pleadings which require different modes of trial, the court will set aside or order to be amended. Where a defendant, in an action on a bill of exchange, pleaded first, judgment recovered; and, secondly, delivery and acceptance of a hogshead of tobacco in satisfaction of the debt,—on an affidavit that both pleas were false, the plaintiff was allowed to sign judgment.(l)

In some cases pleas have been set aside as being calculated to embarrass the plaintiff in replying. Thus where a plea mixed together a great variety of assertions, some of which contained matter of law, and some matters of fact, and the object appeared to be to perplex and delay, rather than to set up a good defence, it was set aside.(m) In an action by the payee of a note against the makers, the defendants pleaded that there was no consideration, and that the note was made subject to the condition, that the defendants should not be called upon to pay, if they were not able, but that it should be renewed. There was an affidavit of falsehood. The court set aside the plea as tricky, false, and calculated to embarrass the plaintiff.(n)

[*200] *The mere fact of a plea being "in matter insufficient" has not hitherto justified an application for leave to sign judgment;(o) for the plaintiff may demur.

Pleading for *delay*, provided it be done falsely, affords ground for setting aside the plea; for every plea whatever, might otherwise be considered to delay the plaintiff. Where the defendant pleaded, 1st, the general issue, except as to part; and as to one-third of that part, 2ndly, a bond given in satisfaction; to another third, 3rdly, a set-off; and to the remaining third, 4thly, a note given to the plaintiff on an affidavit that all these pleas were false, the court allowed the plaintiff to sign judgment.(p) So a false plea to an action on a bond brought by an executor, that before the death of the testator the bond had been assigned, and that payment had been made to the assignee, was set aside;(q) and on the same principle a plea setting out an accounting and payment partly by bill of exchange, and partly by assignment of an Irish judgment debt, and which was wholly false, was set aside.(r)

Frivolous pleadings are considered as tending merely to *delay* and will be set aside; as where an acceptor, sued by an indorsee, pleaded the giving of another bill to the drawer, in renewal, and that he had no notice of the indorsement;(s) and where in an action by the indorsee against the acceptor on two bills, the pleas were to one bill, no consideration between the drawer and the defendant, and to the other, no consideration paid by the plaintiff to the defendant, the pleas were set aside as frivolous.(t)

(k) *Smith v. Hardy*, 8 Bing. 435.

(l) *Bones v. Punter*, 2 B. & C. 777; and see *Nett v. Rush*, 4 Ex. 490.

(m) *Balmanno v. Thompson*, 8 Dowl. 76.

(n) *Mitford v. Finden*, 8 M. & W. 511.

(o) *Cowper v. Jones*, 4 Dowl. 591; *Balmanno v. Thompson*, 8 Dowl. 76.

(p) *Body v. Johnson*, 5 B. & C. 756.

(q) *Corbet v. Powell*, 5 B. & Ald. 750.

(r) *Bartley v. Godlake*, 2 B. & Ald. 199.

(s) *Bradbury v. Emans*, 5 M. & W. 595.

(t) *Knowles v. Burward*, 10 A. & E. 19.

The court has often strongly reprobated this kind of pleading. Indeed bad pleading for delay has been treated as contempt, and the fines for it once *formed a source of revenue to the crown: ^(u) In one case the attorney in the cause was fined, and in many he has [*201] been ordered to pay the costs.

To insure precision in pleading, it was early established: 1, that pleadings should be certain; 2, that they should not be argumentative; and 3, that they should not be double or multifarious.

1. The rule compelling certainty was considered formerly to require a minute statement of time, place, quantity and other matters of description to the proof of which it was found impossible in practice to confine the parties. Hence arose a compromise. Statements were made under a *videlicet*, which gave apparent precision to the pleading, while the averment was satisfied by proof of any other time or quantity. Thus in the case of an action of trover for household furniture, it was usual to charge the defendant with the conversion of one hundred pianos, and to add "five hundred other musical instruments," less the description of the instrument, as a piano did not turn out sufficiently precise; and in the same way to say "one thousand nutmeg graters," and to add five hundred other graters; other instances equally absurd might be mentioned. So to omit to charge in a declaration for *trespass*, that the act was committed *vi et armis*, and against the peace of the Queen, exposed the plaintiff to a demurrer. Now, however, all statements which need not be proved, such as the time, quantity, quality, and value, where these are immaterial,—the losing and finding in trover, and bailments in detinue,—the statement of acts of *trespass* having been committed with force and arms, and against the peace of the Queen—the statement of promises which need not be proved [*promises implied by law*,] as the promises in indebitatus counts, and mutual promises to perform agreements in actions on special contracts,—and all statements of a like kind are to be omitted (s. 49,) and the insertion, therefore, of any of these [*202] *formal statements will be irregular, and according to former technical practice, might have been taken advantage of, and remedied by an application to the court, or to a judge at chambers, to strike out the needless matter as surplusage. ^(v)

The pleadings now in use are alike simple and concise, ^(w) there being only certain forms apparently open to any charge of vagueness or uncertainty. These are indebitatus counts, ^(x) the nature of the claims made in which I have already considered. ^(y) We shall see shortly that a declaration containing these counts, must always be accompanied with "particulars of demand," which in effect deprives the count of the charge of vagueness altogether. A plaintiff may be ordered to add still more detailed and precise particulars than those furnished by him, if a judge orders them; so that a defendant in every case has it in his own power to obtain all necessary information.

^(u) Com. Dig. Prerogative, D. 22.

^(v) Alderson v. Johnson, 5 Dowl. 294.

^(w) Common Law Procedure Act, 1852, Sched. B.

^(x) Ibid., Sched. B. 1, 2, 3, 4, 5, 6.

^(y) Ante, p. 123.

2. The second rule, that pleadings should not be argumentative, requires the facts to be stated, or denied positively and directly, and not by way of argument or inference. Thus if, to a declaration alleging the defendant to be indebted to the plaintiff for goods sold and delivered, he were to plead that credit was given for a certain time, which time had not yet expired, his plea, would be bad; because the declaration of the plaintiff, in such a case, means that the debt is payable *at the time* of the action being brought, and the defence set up would be an argumentative denial of its being so payable. If an argumentative pleading be such as to prejudice, embarrass, or delay, it may be set aside.

8. The third rule was that against duplicity; but a more convenient opportunity will present itself of showing how that ancient rule has been abrogated, when I come to describe the nature and the requisites of the plea.

[*203]

*4 *The Forms of Pleadings.*

Every declaration and other pleading must be entitled of the court in which the action is brought, and of the day of the month and the year when the same is pleaded, and must bear no other time or date, and every declaration and other pleading must also, when the issue is made up, be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge (s. 54.) If not properly entitled, therefore, a pleading may be set aside as irregular, (f) and the date must be stated as "in the year of our Lord," mentioning the year; (g) otherwise it will be irregular. The want of a date altogether, or a date different from that of filing or delivery, will constitute an irregularity, amendable at the plaintiff's cost. (h)

This is the rule as to the title and date of all pleadings, and the making up of the Nisi Prius Record and Judgment Roll. I shall have occasion to point out immediately, that besides these essential particulars, certain pleadings must, in order to be regular, contain other and additional qualities. In this place I have only to add that the Common Law Procedure Act, after reciting that it is desirable that examples should be given of the statements of causes of action, and of forms of pleadings, enacts specially, that the forms contained in the Schedule B. annexed to the Act, shall be sufficient, and that those and the like forms may be used, with such modifications as may be necessary to meet the facts of the case; but that nothing therein contained shall render it erroneous or irregular to depart from the *letter* of such forms, so long as the *substance* is expressed without prolixity (s. 91.)

[*204] I shall now proceed to describe separately the *different pleadings in an ordinary action, their nature, the respective

(f) *Ripling v. Watts*, 4 Dowl. 290.

(g) *Holland v. Tealde*, 8 Dowl. 320.

(h) *Hodson v. Pennell*, 4 M. & W. 373.

periods within which they must be delivered, and the manner in which their delivery at these stated times is, if necessary, enforced.

5. *The Declaration.*

The first of the pleadings in an ordinary action is the Declaration, anciently termed the "count," of the plaintiff, which, in the words of Sir Edward Coke, "is an exposition of the writ, and addeth time, place, and other circumstances, that the same may be triable." Consequently in the declaration three things are essential :—

1. It must correspond with the writ.
2. It must be sufficient in law, i. e., it must aver facts necessary to support the action.
3. These facts must, as we have seen, be set forth with certainty and truth.

The declaration must correspond with the writ in—1, the names of the parties; 2, the number of the parties; 3, the character in which the plaintiff sues or the defendant is sued.

An incorrect statement of the plaintiff's name may be amended, at his cost, on the defendant's application. The declaration is not on this ground irregular.(i)

If the defendant appears by another name than that in which he is sued, the plaintiff ought to declare against him in that name, thus :—

Middlesex.—John Jones, by H. J. S., his attorney, sues William Williams [who by the name of Peter Williams has been summoned to answer the said John Jones,] for &c.

If the defendant is misnamed he may apply to have the declaration amended by inserting the correct name;(k) which application should be by a summons at chambers, founded on an affidavit of the correct name.

2. A declaration by one of two plaintiffs named *in the writ [*205] would be irregular(l) unless in the event of the death of the other, which should then be suggested in the declaration (s. 136.) But a plaintiff who has sued several defendants may declare against one, though in such a case he runs the risk of a plea in abatement, if the action be one founded on contract.

3. A plaintiff simply named in the writ may declare in a representative capacity; but if he has described himself as *executor*, or as *administrator*, or as *assignee*, he can only declare for a cause of action accruing to him in such character.(m) The same rules hold with respect to defendants; and it must be noted that if the plaintiff sue, or the defendant is sued in a representative capacity, as *assignee* of a bankrupt or insolvent, *executor*, *administrator*, or as authorized by Act of Parlia-

(i) *Lindsey v. Wells*, 3 Bing. N. C. 777.

(k) *Rush v. Kennedy*, 7 Dowl. 199.

(l) *Rogers v. Jenkins*, 1 B. & P. 383.

(m) *Anon.* 1 Dowl. 97.

ment to sue or be sued as a nominal party, this representative character is not in any case put in issue unless specially denied.(n)

The declaration must aver the facts necessary to support the action; if it does not do so it will be insufficient in law, and may be demurred to (s. 50). Thus, where the declaration stated "that the defendants were indebted to the plaintiff for freight for the conveyance by the plaintiff for the defendants, at their request, of goods in ships" (instead of stating that the defendants were indebted to the plaintiff "for money payable by the defendants to the plaintiff for freight for the conveyance, &c.") it was held bad in substance because it did not aver that the debt was a *money debt*, or that the debt was payable before the commencement of the suit.(o)

The facts stated in the declaration must be stated with *certainty* and *truth*. If they are not stated with *certainty*, but in such a way as to prejudice or embarrass the defendant in his defence (yet without rendering the declaration demurrable,) he may, as we have seen, apply to the [206] court or a judge to have *the declaration amended. A plaintiff rarely delivers an objectionable declaration intentionally. The facts ought also to be stated with *truth*, for the defendant may deny every averment, and thus raise on each an issue in fact. To the costs of each issue found in his favour by the jury he is entitled, even if the general result of the action be against him (s. 81).

A declaration consists of—1. The *Title*. 2. The *Venue*. 3. The *Commencement*. 4. The *Body*. 5. The *Conclusion*.

The title is a statement of the court in which the action is brought, and of the day of the month and year of our Lord when the declaration is delivered or filed, as thus:—

In the Queen's Bench.

The day of in the year of our Lord, one thousand
eight hundred and fifty-three.

The venue is an entry in the margin of the declaration,(p) stating the county in which the action is to be tried, and from which the jurors who are to try it are to be summoned. It is selected by the plaintiff; but his choice depends on the fact of the action being in its nature local or transitory.

An action is said to be *local* when the cause of it could only have happened in one county. Thus, trespass qu. cl. fr. is local; so is replevin; so generally are actions for injuries to real property. An action is said to be *transitory* where the cause of action might have happened anywhere. Thus, actions on personal contracts, for slander, or for assault, and generally those which relate to personal property, are transitory. Actions on bills, notes, and specialties are transitory, for *contractus est nullius loci*. Some actions are by particular statutes local,

(n) R. G. T. T. 1853. 5.

(o) *Place v. Potts*, 22 L. J. R.; 269 Ex. "Weekly Reporter," 1852-53, 337.

(p) R. G. T. T. 1853, 4.

which would otherwise be transitory; but these I cannot at present particularize.(q)

In local actions, then, the venue must be laid in the county in which the cause of action arose. Thus *in a declaration for a trespass qu. cl. fr. committed in Yorkshire, the venue must be Yorkshire. [*207] In an action on a bill endorsed to him in Liverpool, or on a bond sealed in London, the plaintiff may lay the venue in Northumberland or Devonshire. For at common law, the plaintiff, in a transitory action, may lay the venue where he pleases. The stat. 2 Rich. II., c. 2, ineffectually enacted that the venue should be laid in the county in which the cause of action arose; for in the great majority of actions the cause of action is transitory. Upon an affidavit that the cause of action, if any, arose in another county, and not in the county in which the venue is laid, the venue will, on the application of the defendant, be changed to that other county, by rule of court or judge's order. This is called the common affidavit. But in the affidavit on which the defendant applies to change the venue (an application, which ought in general to be made before issue joined, to a judge at chambers,) he ought to state all the circumstances on which he means to rely as the ground for the change of venue; for the plaintiff may, in showing cause against a rule nisi or summons, state in his affidavit circumstances to show that the cause may be more conveniently tried in the county in which it is originally laid, or other good reasons why the venue should not be changed; and if the plaintiff does so the common affidavit will not be sufficient.(r)

But the venue will always be changed on affidavit of *special facts*, as that a fair trial cannot be had in the county where the venue is laid, or that the witnesses live in the county to which it is proposed to change it. In the latter case the application cannot be made till *after issue joined*, as the court till then cannot judge in what county it will be proper to lay the venue.(s) In *local* actions the venue may be changed (3 and 4 Will. IV., c. 42, s. 22) on a special application.(t)

*If no venue was stated at all, the declaration might formerly have been demurred to,(u) or the defect have specially pleaded.(v) [*208] An error in this respect will possibly now only afford ground for the setting aside the declaration or having it amended; for the statement of a wrong venue is not a ground of nonsuit;(w) and this defect is aided by verdict or judgment by default.(x)

The *Commencement* points out the name of the plaintiff, and whether he sues in person or by attorney; and the name of the defendant.

Every declaration must commence as follows, or to the like effect (s. 59.)

(q) Peacock v. Bell, 1 Wms. Saund. 73.

(r) R. G. H. T. 1853. 18. De Rothchild v. Shilston, 8 Ex. 503.

(s) Youde v. Youde, 4 Dowl. 32.

(t) Bell v. Harrison, 4 Dowl. 181.

(u) Remington v. Taylor, 1 Lut. 235; Tremere v. Morrison, 4 Moo. & Scott, 609.

(v) Richards v. Esto, 15 M. W. 244.

(w) Boys v. Hewston, 7 C. & P. 127.

(x) 1 Wms. Saund. 241. f.

Middlesex.—“A. B. by H. J. S., *his attorney* [or *in person*, as the case may be] *sues* C. D. *for* [here state the cause of action.]”

The declaration of an infant who can only sue by *prochein amy*,^(y) may be in this form:—

Middlesex.—A. B. by O. M., *who is admitted by the court here as the next friend of the said A. B., to prosecute for the said A. B., who is an infant under the age of twenty-one years, sues* C. D. *for, &c.*

If the form prescribed is not followed, as by omitting the statement of whether the plaintiff sues in person or by attorney, the declaration will be irregular, and may be set aside, or amended on the defendant's application (s. 222,) which ought to be made to a judge at chambers.^(z)

The *Body* is the statement of the cause of action, or if composed of different counts, of the several causes of action for which the plaintiff [209] sues. In the body must, we have seen, be stated all the facts *necessary to support the last part of the declaration, viz. :—

The *Conclusion*, which either claims a sum of money of debt or damages, or a return of specific goods and damages for their detention; for every declaration must conclude as follows, or to the like effect (s. 59):—

“*And the plaintiff claims £* , [or if the action is brought to recover specific goods, *the plaintiff claims a return of the said goods or their value, and £* *for their detention.*.]”

The “original writ” was founded on one single cause of action, being the particular inquiry to the plaintiff, which was to be thereby remedied; but a “writ of summons” is not required for each separate cause of action, which the plaintiff may have against the defendant; or, rather, the plaintiff is not, in his declaration or exposition of the writ, confined to the statement of one cause of action. The writ calls on the defendant to answer the plaintiff in an action generally: in that action the plaintiff may include all the claims he has against, or sue for redress of all the injuries he has sustained from the defendant (s. 41); and in an action by a husband and his wife for an injury done to the wife, in respect of which she is necessarily a party, the husband has the privilege, as I have already pointed out,^(a) of including claims arising to him in his own right (s. 40).

It has been the universal practice for the plaintiff to set out his cause of action by different *counts* in the same declaration: so that if he failed in the proof of one, he might succeed in another. Thus in the following declaration—

(y) *Ante*, p. 13. *Leech v. Clabburn*, 21 L. J. R. Ex. 37.

(z) *White v. Feltham*, 3 C. B. 658.

(a) *Ante*, p. 65.

In the Queen's Bench:

The day of , in the year of our Lord one thousand eight hundred and fifty .

Middlesex.—John Jones, by H. J. S., his attorney, [or in person] ~~sues~~ William Williams, for that the defendant, on the day of , in the year of our Lord one thousand eight hundred and fifty , by his promissory note, now overdue, *promised to pay the plaintiff £ , two months after date, but did not pay the same; and [*210] also for money payable by the defendant to the plaintiff [ex. gra.] for goods sold and delivered [if such was the consideration for the note], and for money found to be due from the defendant to the plaintiff, on accounts stated between them. And the plaintiff claims £ .

there are three counts: the first on a note; the second for goods sold; the third, on account stated. If the plaintiff fails to prove the signature to the note to be that of the defendant, he may prove that he sold and delivered goods to him, in which, if he also fail, he may be able to prove that he and the defendant stated an account; for if he prove the case laid in any one of these counts, though he fail in the others, he will recover a verdict.

But the practice of having several counts led formerly to so much abuse, that it was often checked by rules of court, and at present several counts on the same cause of action are not allowed; and any count or counts in violation of this rule may be struck or amended by the court, or a judge, on the application of the defendant within a reasonable time, or if not struck out, may involve the plaintiff in costs.(b)

When there are several counts in the declaration, they need not necessarily belong to any form of action. In a previous page I have enumerated the different forms of action in general use. No two of these forms could formerly have been joined in one action (except that *debt* might have been joined with *detinue*, and *case* with *trover*;) so that a claim against a tenant for a breach of a covenant to repair, contained a lease under seal, and a further claim against him for the non-repair of another house, let by an agreement not under seal, must have formed the subject of two actions, one of covenant and the other of *assumpsit*. Instances of this rule of law, the origin of which need not be here explained, might easily be multiplied. It has appeared to the legislature unreasonable that a plaintiff *should be compelled to bring [*211] two actions, when the different causes of complaint might, without inconvenience, be combined in one, as when he has one claim on a bond and another on a bill, or seeks redress for slander, and also for an assault, from the same person. The rule has therefore been altered, and a plaintiff may, as I have previously remarked, join in the same action all his causes of complaint. *Replevin* and *ejectment*, two actions of totally different natures to the others, cannot be joined together, or with

(b) R. G. T. T. 1853. 1. 3.

any other form of action; but the declaration, may contain counts in *debt*, counts in *assumpsit*, counts in *trespass*, and counts in *case* (s. 41).

Where two or more of such cases of action are local, the venue may be laid in either of the counties where the rule as to venue requires it to be laid; and if a trial of the different causes of action together appears to be inexpedient, the court or a judge may order separate *nisi prius* records to be made up for trial (s. 41.)

In the schedule to the Common Law Procedure Act are given, as I have already stated, forms of the *counts*, or statements of different causes of action in declarations. These are the simple and concise forms which are now to be adopted, with such modifications as may meet the facts of each case; and while a departure from the *letter* of these forms *will not be irregular* (s. 91), any *omission* of necessary averment may, as we have seen, lay the declaration open to a demurrer.

The plaintiff has till the conclusion of the term next after the entry of appearance in which to declare against the defendant, without having judgment of non pros. signed against him.(c)

If unable to declare within that time, he may obtain further time to declare by an application to a judge at chambers. The defendant may put a stop to delays, if the application be repeated, by serving a written notice to declare on the plaintiff; and four days after doing so, he may, if [212] the plaintiff does not *declare, sign judgment of non pros., a judgment given by 13 Car. II. c. 2, and deriving its name from the words "non prosequitur," because the court thereby adjudges, that the plaintiff "non prosequitur," does not prosecute his suit (s. 53).

If the plaintiff, after this notice, requires further time, his course is to apply for it specially to the court, or a judge, and if he obtains further time to declare, the defendant is entitled to sign judgment of non pros. at the expiration of the time allowed, without a fresh notice.(d)

Supposing the defendant to do nothing, if the plaintiff does not declare within a year after the writ of summons is returnable, which it is immediately on being served,(e) he will be deemed out of court, and his action at an end (s. 58).

We have already seen that no declaration can be delivered or filed during the long vacation.(f)

I have also had occasion to mention(g) that the apparent vagueness of the *indebitatus* counts in a declaration is remedied by means of "particulars of demand." A rule of court requires that with every declaration—unless the writ has been specially indorsed—delivered or filed, containing *indebitatus* counts,(h) the plaintiff shall under the penalty of incurring certain costs) deliver, or file particulars of his demand under those claims, where they can be comprised within three folios; and where they

(c) *Foster v. Prynne*, 9 Dowl. 749.

(d) *Teulon v. Gant*, 5 Dowl. 153.

(e) *Chaplin v. Showler*, 18 L. J. R. 34 Ex.

(f) *Ante*, p. 134.

(g) *Ante*, p. 202.

(h) *Common Law Procedure Act*, 1852, Sched. B. 1-14.

cannot be so comprised, he shall deliver such a statement of the nature of his claim as may be so comprised.(i)

The special indorsement, in a great majority of cases, supplies the place of "particulars of demand;" but where there is no special indorsement, particulars must be furnished with the declaration.

*The form in use for this purpose is as follows:— [•213]

In the Queen's Bench :

Between { A. B., plaintiff,
and
C. D., defendant.

This action is brought to recover [state the amount and nature of the debt, setting forth the several items constituting the claim, together with the dates.]

Above are the particulars of the plaintiff's demand in this action, for the recovery whereof he will avail himself of the whole or any part of the declaration. Dated this day of , 18 .

Yours, &c.,

H. J. S., *plaintiff's attorney*
[or agent].

To Mr.

the above-named defendant.

The plaintiff must also, as shall be pointed out afterwards, indorse on the declaration, or deliver along with it, a notice to the defendant to plead thereto in eight days (s. 63).

If the plaintiff has taken no step in the action during four terms; if, for instance, he has given notice to plead, but has not signed judgment for want of a plea, and four terms have elapsed since the notice was given, the defendant is entitled to a month's notice from the plaintiff, of his intention to proceed, before the plaintiff can take any farther step, as in the case supposed, by signing judgment.(k)

6. The Plea.

The plaintiff having declared, the defendant must state his answer to the action—technically, he must plead. He is not bound to do so, unless he has had a "notice to plead," which is usually, however, though not necessarily, indorsed on the declaration, and is in this form: (l)

The defendant is to plead hereto in eight days, otherwise judgment.

H. J. S., *plaintiff's attorney.*

*This notice is intended as a warning to the defendant, in order that judgment for want of a plea, (i. e. *judgment by nil* [•214])

(i) R. G. H. T. 1853, 19.

(k) R. G. H. T. 1853, 176.

(l) When the notice is not indorsed on the declaration, but delivered separately, which it may be, it is necessary to entitle it, in the court, and of the cause, and to address it to the defendant's attorney.

dict, which is in the nature of a judgment by default,) may not be signed against him by surprise.

The want of this *notice* will be an irregularity, and judgment signed for want of a plea will be set aside. So a notice which gives less time than the defendant is entitled to will be irregular.(*m*)

But the defendant may waive an irregularity in the notice, as by taking out and serving a summons for time to plead ;(*n*) for if he cannot prepare his plea within the time allowed him, he may apply to a judge at chambers for further time, which is given at first almost as a matter of course, though as I have formerly pointed out,(*o*) terms may be imposed on the defendant, such as taking short notice of trial.

The defendant may also apply, if he require additional information for "further and better particulars" of the plaintiff's claim.

But there are applications besides those for time further to plead and for better particulars, which may be, and generally are, made by the defendant before pleading. Thus the defendant may call upon the plaintiff to give security for costs, where he is resident out of the jurisdiction. This application must in general be made before issue joined,(*p*) and appearance must have been entered before the application.(*q*) Proceedings will be stayed until such security be given, even if the plaintiff be a foreign sovereign ;(*r*) but not if the plaintiff actually reside in this country.(*s*) But in order to have a stay of proceedings, an application for security must be made to the plaintiff before the application to the court [**215*] or judge ;(*t*) and unless **such* application be made, the defendant will have to pay the costs of the motion.(*u*) Two days' notice of the intended application must also be given to the plaintiff.(*v*)

The application may be made *after* issue joined, if the necessity for it has first come to the defendant's knowledge, and no step has been taken in the cause subsequently to such knowledge.(*w*)

Another occasional application by defendants is, that several actions may be consolidated. It is one generally made when the cause of action is the same in all the suits, and the result in all may be made dependent on the verdict in one, as where several actions are brought against underwriters on the same policy of insurance. Sometimes, too, where several actions are vexatiously brought against a defendant, they are consolidated even after issue joined.(*x*)

The most important application generally made by a defendant at this stage of the cause, however, is for leave to inspect a document in the possession of the other party, if a knowledge of its contents is necessary,

(*m*) *Maty v. Baldock*, Barnes, 302.

(*n*) *Bolton v. Manning*, 5 Dowl. 769.

(*o*) *Ante*, p. 37.

(*p*) R. G. H. T. 1853, 22.

(*q*) *Cole v. Beady*, 5 Dowl. 161.

(*r*) *Otho, King of Greece, v. Wright*, 6 Dowl. 12.

(*s*) *Tambisco v. Pacifico*, 7 Ex. 816.

(*t*) *Ballie v. De Bernales*, 1 B. & Ald. 331.

(*u*) *Fletcher v. Lew*, 3 Ad. & El. 551.

(*v*) R. G. H. T. 1853. 160.

(*w*) *Duncan v. Stint*, 5 B. & Ald. 702.

(*x*) *Booth v. Payne*, 1 Dowl. N. S. 348.

to enable him to prepare his defence. For whenever any action, or other legal proceeding, is pending in any of the supreme courts of common law at Westminster . . . such court and each of the judges thereof, may, on application by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody, or under the control of such opposite party, relating to such action or other legal proceeding; and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which a discovery may be obtained by filing a bill, or by any other proceeding in a Court of Equity at the instance of the party so making application as aforesaid to the said court or judge.(y) The powers thus given to the Supreme Courts of *Common Law will, in all probability, be extended by further legislation.(z) [*216]

We have already seen that when the defendant resides abroad, a reasonable time must be allowed him to appear. As regards such defendants, the time for pleading will necessarily vary, for it will depend on the discretion of the court, which is to be exercised in the particular circumstances of each case.

In cases where the defendant is within the jurisdiction, the time for pleading in bar, unless extended by the court or a judge, in *eight days*; and a notice requiring the defendant to plead thereto in eight days, otherwise judgment may, as we have already seen, be indorsed upon the declaration, or delivered separately (s. 68). But there are certain pleas, for pleading which only *four days* are allowed.

The nature of these I must shortly describe before proceeding farther; but before doing so I must mention, and I need not do more than mention, a proceeding which occasionally takes place: viz., a claim of cognizance, which may be made, "when any person or body corporate hath the franchise, not only of *holding pleas* within a particular limited jurisdiction, but also of the *cognizance of pleas*: and that, either *without* any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts at Westminster, to demand the cognizance thereof; or *with* such exclusive words, which also entitle the defendant to plead to the jurisdiction of the court. Upon this claim of cognizance, if allowed, all proceedings shall cease in the Superior Court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction; as, when a scholar, or other privileged person of the Universities of Oxford or Cambridge is impleaded in the courts *at Westminster, for any cause of action whatsoever, unless [*217] upon a question of freehold. In these cases, by the charter of those learned bodies, confirmed by act of parliament, the Chancellor or Vice-Chancellor may put in a claim of cognizance, which, if made in due time and form, and with due proof of the facts alleged, is regularly allowed by the courts."(a)

(y) Hunt v. Hewitt, 8 H. 236.

(z) Common Law Commissioners, 2nd Report, 1853.

(a) The nature of the proceedings in a claim of cognizance may be learned

A claim of cognisance must be made before plea pleaded, because to plead to the action itself would be to admit the jurisdiction of the court over it, which the lord of the franchise, by his claim, insists he alone has, the crown having originally granted to him this exclusive privilege.

We now come to the plea itself, which, as I have formerly said, is the defendant's answer to the declaration of the plaintiff, and is either a *plea in abatement* or a *plea in bar*.

A *plea in abatement* is one which shows ground for *abating* the proceedings. It does not answer the action, but shows that the plaintiff has committed an error, which it points out; for it is a rule, that no plea of abatement shall be allowed, unless the defendant will, in the same plea, give the plaintiff a better writ, i. e. point out the error, that it may be avoided again. The *plea in bar* is the substantial answer to the action.

Pleas must be pleaded in an established order, so invariable, that all pleas prior in the series to the plea pleaded are held to be waived. This order is the following:—

1. To the jurisdiction, which is a plea in bar, and is very rare. An instance occurs in the case of ejectment brought in the courts of Westminster, to recover land in a County Palatine. This plea must be pleaded [*218] first, because by pleading any other, the defendant at once admits that the court has jurisdiction to give judgment on that other plea.

2. To the disability of the plaintiff.
3. To the disability of the defendant.
4. To the declaration itself.
5. In bar of the action.

The second and third of these are pleas in abatement, and in order to the proper comprehension of their nature, it is necessary that I should say a few words on the subject of parties to actions.

Now actions we have seen arise either from *contract* or from *tort*. Supposing a contract to have been made with A. B. and C., and that A. and B. sue for a breach of it, it is clear that if C. with whom along with A. and B., the defendant contracted, is left out of the action, no contract between the plaintiffs and the defendant can be made out at the trial, where a contract between A. B. and C. and the defendant will be proved.

The omission, therefore, in actions on *contract*, of a party as a plaintiff might hitherto have been fatal, and been taken advantage of under the general issue. (b) In an action of *tort*, in which A. B., we shall suppose, complained of an injury committed by the defendant on A. B. and C., the omission of C. as a plaintiff may be taken advantage of a plea in

from a perusal of the cases of *Turner v. Bates*, 10 Q. B. 292; and *Newton v. Nancarrow*, 15 Q. B. 144.

(b) Except indeed in the case of executors; *Jones v. Smith*, 1 Ex. 831, where the cases are referred to.

abatement. For while A. and B. are clearly entitled to a remedy for the injury they have sustained, the defendant is equally entitled to insist that only one action shall be brought for one injury, and that C. shall be made a plaintiff; for otherwise C. might bring a second action for the damages he had individually sustained.

The nonjoinder of a plaintiff may now, however, be amended at any time in the course of the proceedings (s. 39), and also at the trial (s. 35); but the *party to be joined as plaintiff must consent, either [*219] in person or in writing, to be so joined.

The joinder in actions on *contract* of a party as a plaintiff who ought not to have been so joined, may, it will readily appear to the reader, be fatal; in actions of *tort* such joinder must be fatal; for the defendant had not wronged A. B. C. and D., when he had only injured A. B. and C. In actions of either nature such misjoinder may now be remedied at any time before, or at the trial; but in order to amend the proceedings by striking out a plaintiff, it must be shown either that the party was joined without his consent, or that he consents to be struck out (ss. 34, 35).

With regard to the misjoinder or nonjoinder of defendants again, the joinder of a defendant, in an action of contract, who ought not to be joined, is fatal; for how can the plaintiff recover from A. B. C. on a contract made with A. and B. only?—while the omission of a defendant who ought to be joined can be taken advantage of by plea in abatement; for while A. is, to the full extent of the debt, liable to the plaintiff, not less so is B., and A. is entitled to have B. joined as a defendant, that he may bear his proportion of the loss which they have jointly caused the plaintiff to sustain. In actions of *tort*, the joinder of persons not liable as defendants entitles them to an acquittal; for if I sue A. B. and C. for a trespass committed by A. and B., C. will be acquitted on a plea of not guilty; while the nonjoinder of persons jointly liable is of no consequence; for if A. and B. have committed a trespass on my land, both or either of them must answer for it to me; and the mere fact of my having sued C. for the trespass along with them does not make A. and B. less guilty or less liable to me.

2. *A plea to the disability of the plaintiff*, then, may be either for *nonjoinder* or *misjoinder*. The nonjoinder of a person who ought to be a co-plaintiff in actions on *contract*, is a ground of *nonsuit*; but it may also be pleaded in abatement by the defendant. *Such a plea [*220] to a declaration for money received by the defendant for the use of the plaintiff may be in this form: (c)—

In the Queen's Bench:

On the day of A. D. 185 .

C. D. } The defendant says that the money received by him was re-
ats. } ceived by him to the use of the plaintiff, and one G. H. who is
A. B. } still living.

(c) *Davies v. Evans*, 6 C. & P. 619.

FEBRUARY, 1854.—11

If the defendant plead the nonjoinder in abatement, the plaintiff, if the plea is well founded, may, without any order, amend the *writ* and other *proceedings* before plea, by adding the name or names of the person or persons named in the plea in abatement, and proceed in the action without any further appearance, on payment of the costs of, and occasioned by, such amendment only. In such case the defendant will be at liberty to plead *de novo*. If, however, the defendant wait till the trial, in the hope of nonsuited the plaintiff, the amendment may be made by the judge at the trial (s. 36); unless, indeed, a notice has been given to the plaintiff by the defendant, that he objects to the nonjoinder, the effect of which notice however will be the same as that of a good plea in abatement, *viz.*, to induce the plaintiff to amend in the same way as if there were a plea in abatement.

The nonjoinder of a person who ought to be a co-plaintiff in actions of tort can only, as I have above pointed out, be pleaded in abatement.(d) A defendant in an action of tort must therefore plead in abatement, and the plaintiff may thereupon, as in actions of contract, amend the writ, appearance, and declaration.

The payment of the costs of and occasioned by the amendment is in both cases a condition precedent to the amendment, and the plaintiff should, therefore, have the costs of the defendant taxed, and pay or tender them to the defendant, otherwise his proceeding in the action would be irregular.(e)

Pleas in abatement are discouraged by the courts, *and those [*221] for nonjoinder of a co-plaintiff must be verified by an affidavit (4 and 5 Anne, c. 16, s. 11), which must be delivered with the plea, unless further time is obtained.(f)

The affidavit may be in this form:—

In the Queen's Bench:

Between { A. B., plaintiff,
and
C. D., defendant.

C. D., of _____, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and fact.

A plea in abatement for nonjoinder may be necessary where the plaintiff, suing alone, is in reality a married woman.(g)

Hitherto of the nonjoinder of plaintiffs. The misjoinder may be amended, as a variance(h) at the trial, if it appears that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid, consent, either in person or by writing, under his, her, or their hands, to be so joined (s. 35.) This amendment is to be made upon such terms as the judge thinks proper, and it ought to be made so

(d) *Broadbent v. Ledward*, 11 A. & E. 209.

(e) *Levy v. Drew*, 5 D. & L. 307.

(f) *Johnson v. Popplewell*, 2 Tyrw. 717.

(g) *Bendix v. Wakeman*, 1 D. & L. 450.

(h) *Ante*, p. 34.

that no additional expense be thrown on the defendant; and if the defendant pay at once the sum claimed under the amended declaration, he will be entitled to his costs from the time that he might have paid the money into court; it is otherwise if he defends the action;(i) but the terms on which the amendment will be allowed are in the discretion of the judge at the trial, whose decision will not be reviewed by the court.(k)

The amendment is indorsed on the *postea*, and *returned with [*222] the *nisi prius* record. The order may be in the following terms:—

According to the Common Law Procedure Act, 1852, I do order that the plaintiff have leave to amend, and that he do amend accordingly, the within record by inserting [or striking out] in the declaration the words [set out the words] on payment of costs, to be taxed by the Master [or on payment of the sum of costs.] Dated the day of 18 .
[Judge's Signature.]

3. A plea to the disability of the defendant occurs only in the case of the nonjoinder or misjoinder of a defendant in an action *ex contractu*; for in actions *ex delicto* the plaintiff may always remedy the error of a misjoinder of defendants, by entering a *nolle prosequi*, before the trial, as to the defendant misjoined; otherwise at the trial there will be an acquittal: and, as we have seen, in actions of tort there is no plea of abatement for nonjoinder; for the maxim of the law is, that there can be no contribution among wrong-doers, and that each is liable to the injured party for the full damage the plaintiff has sustained.

The nonjoinder of a defendant, then, can only be taken advantage of, in actions of contract, by a plea in abatement.(l) Such a plea may be in this form:—

In the Queen's Bench,

On the day of A. D. 18 .

C. D. } *The defendant, by his attorney, says that the debt*
ats. } *[or debts] in the declaration mentioned was [or were] contracted*
A. B. } *by, and became and was [or were] due and payable from the*
defendant, jointly with one G. H. who is still living, and who before and
at the time of the commencement of this suit was and still is resident
within the jurisdiction of this court, that is to say, at , in the
county of , and not by the defendant alone.

It must state the party not joined to be still living:(m) and the stat. 3 and 4 Will. IV., c. 45, s. 8, requires that the plea shall also contain an allegation, that the defendant resides within the jurisdiction of the court, *and be accompanied with an affidavit stating the place of such [*223] residence. This affidavit may be in this form:—

(s) *Smith v. Brandram*, 2 M. & G. 250.

(k) *Tomlinson v. Ballard*, 12 L. J. R. 257, Q. B.

(l) *Rice v. Shute*, 6 Burr. 2613.

(m) 1 Wms. Saund. 291.

In the Queen's Bench, &c.

Between $\left\{ \begin{array}{l} \text{A. B., plaintiff,} \\ \text{and} \\ \text{C. D., defendant.} \end{array} \right.$

C. D., of _____, in the county of _____, gentleman, the above-named defendant in this cause, maketh oath, and saith, that the plea hereto annexed is true in substance and in fact; and that G. H. therein named at the time of the commencement of this suit resided and doth still reside at No. _____, in _____ street, in the parish of _____, in the county of _____, and within the jurisdiction of this court.

Sworn, &c.

A plea in abatement should mention *all* the co-defendants not joined, so that the plaintiff may have a better writ, otherwise, if the plaintiff take issue on the plea, he will succeed.⁽ⁿ⁾ So if any one of the co-contractors is not resident within the jurisdiction, this plea cannot be pleaded successfully.^(o)

In this case, as in the case of nonjoinder of a plaintiff, the plaintiff may amend the proceedings; for in any action on contract where the nonjoinder of a co-defendant is pleaded in abatement, the plaintiff is at liberty, without any order, to amend the writ of summons and the declaration, by adding the name of the person named in the plea, and to serve the amended writ upon the person so named, and to proceed against the original defendant and the person so named. The date of such amendment, as between the person named in such plea in abatement and the plaintiff, is considered for all purposes as the commencement of the action (s. 38).

If the plaintiff amend he must declare *de novo*, and the declaration must then be in the following form, or to the like effect (s. 60).

[*224] **[Venue]* "A. B. by E. F., his attorney [or in his own proper person, &c.] sues C. D. and G. H., which said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H. for," &c.

The date of the new declaration is, as to the new defendant, the commencement of the action, the object of this provision being to save the right of that defendant, if it should happen that, to the plaintiff's claim, the Statute of Limitations is pleadable by him. If a defendant pleads in abatement that any other person ought to be jointly sued, and issue be joined on such plea, and it appears at the trial that the action could not, by reason of the Statute of Limitations, be maintained against the other person named in such plea, the issue will be found against the party pleading the same (9 Geo. IV., c. 14, s. 2.) If, on the other hand, upon the trial it appears that the added defendant was jointly liable with the original defendant, the latter will be entitled as against the plaintiff to the costs of the plea in abatement and amendment: but if it appears that the plaintiff cannot maintain his action against both

(n) *Crellin v. Calvert*, 14 M. & W. 11.

(o) *Joll v. Curzon*, 4 C. B. 283.

the original and added defendant, but can maintain his action against the original defendant alone, the added defendant will recover his costs from the plaintiff, and the plaintiff will recover against the original defendant his own costs, those of the plea in abatement, and also the costs he has paid to the added defendant (s. 39).

Pleas in abatement, as I have already remarked, are discouraged by the courts; only *four days* are allowed for pleading them. Of the four days allowed for pleading, one is inclusive, the other exclusive. (p) If the fourth day is a Sunday, the defendant may plead on Monday. (q)

The *misjoinder* of defendants may be remedied now in the same way as the nonjoinder of plaintiffs; for the court or a judge may, in the case of a joinder *of too many defendants, at any time before the [*225] trial of his cause, order that the name or names of one or more of such defendants be struck out, if it appears that injustice will not be done by such amendment; and the amendment will be made upon such terms as the court or judge thinks proper (s. 37). In case it appears at the trial that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs may be amended; and upon such terms as the judge by whom such amendment is made thinks proper (s. 37).

The court will allow the name of a defendant to be struck out of the proceedings, subsequent to the writ, on payment of costs, the remaining defendant being allowed to plead *de novo*. (r)

I have now pointed out how the proceedings may in all cases be amended in case of the misjoinder of a plaintiff, who ought not to have been included in the action, or the nonjoinder of a person whose name ought not to have appeared in the proceedings. In doing so, I have necessarily taken it for granted that the plea in abatement, which, we have seen, must be verified by an affidavit, is true in point of fact. There is another course open to the plaintiff, by adopting which he may avoid the payment of costs to the defendant, but must at the same time sacrifice his own. He may enter a *cassetur breve*. To do so he ought (strictly) to make up the record, but in practice this is not done, for the plaintiff generally only delivers a copy of the entry, entitled in the court and cause, to the defendant's attorney, as if it were an ordinary pleading, in the following form:—

In the Queen's Bench, &c.:

On the day of , A. D. 18 .

And the plaintiff, inasmuch as he cannot deny the matters above pleaded, prays that the writ of the plaintiff sued out herein against the defendant may be quashed, to the intent that he may sue out a better writ against him, Therefore it is considered that the said writ be quashed, &c.

(p) *Ryland v. Wormald*, 5 Dowl. 581.

(q) *Lee v. Carlton*, 3 T. R. 642.

(r) *Palmer v. Beale*, 9 Dowl. 529; *Jackson v. Nunn*, 4 Q. B. 209; *Cranford v. Cocks*, 6 Ex. 287.

[*226] *The plea in abatement may not, however, be founded on fact, and, if so, the plaintiff will reply to it, as if it were a plea on bar; but this will be better treated of when I come to describe the replication.

4. *A plea to the declaration* (using the word "plea," in its larger sense, and not in its strict and technical meaning, as the defendant's answer by matter of fact to the action) may be a demurrer for insufficiency in matter of law: of the demurrer itself I shall have occasion to treat afterwards.

5. The plea *in bar* is the substantial answer to the action; and such plea must, as has been pointed out already, be either a *traverse* or in *confession and avoidance*. It must either traverse, i. e., deny the facts in the declaration; or admit, i. e., confess the facts to be true, but show some new matter which destroys or avoids the plaintiff's right of action.

Anciently, a party was not allowed to plead two grounds of defence to the same cause of action. A defendant could not plead that he had paid a debt, and, at the same time, that the action was barred by the Statute of Limitations. This is one illustration of the rule against duplicity or multifariousness, which I formerly mentioned as owing its origin to the necessity of having pleadings precise. Neither could a plaintiff, in answer to a plea of a release, reply by denying the release, and, at the same time, further averring that it had been obtained by fraud. A party was further prohibited from denying the pleading of his adversary in point of fact, and at the same time its effect in point of law, but was obliged to take his choice between the two; that is, he was not permitted to demur, by saying that the declaration or plea was insufficient in law, and at the same time, to traverse the facts alleged in it; for by demurring a party is held to admit the truth of the facts alleged in the pleading demurred to, and merely to ask the judgment of the court, if he ought to be called upon to answer such an insufficient pleading. There are other illustrations of the rule *against duplicity.

[*227] The hardship of the rule, with reference to matters of fact, was partly removed by a statute of Queen Anne, which enabled a defendant by leave of the court to plead several pleas. The enactment did not extend, however, to any subsequent stage of the pleadings; so that where several facts were comprised in a plea, the plaintiff was in many cases restricted to the denial of some one, and obliged to admit all the rest, although they might be wholly untrue; while in no case could a plaintiff reply twofold matter of answer. The injustice of compelling a litigant to admit a considerable portion of the statement of his antagonist, when that statement might be untrue, or of admitting either the truth of the facts stated or the legal effect of the statement, when both might be open to denial, does not seem to require comment.

It only excites surprise, when we find that this state of things existed till the middle of the nineteenth century; for the technical rules, I have just referred to, have been only lately abrogated.

A defendant may now either traverse generally such of the facts con-

tained in the declaration, as might formerly have been denied by one plea, i. e., by the *general issue*, a plea which shall be afterwards explained; or he may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse (s. 76).^(s)

The defendant may thus traverse all the facts alleged in the plaintiff's declaration; but this evidently does not enlarge in any way his right to plead in confession and avoidance; and it will be recollected that, at common law, he is allowed but *one plea to each count* of the declaration; for, it was anciently argued, that as one defence is sufficient to rebut the action, the defendant can have no occasion to set up others. But as he may, in truth, have *several good defences to the same* [*228] action, he is now at liberty to plead several pleas, not merely to traverse several matters (s. 81); a great number, and all those in ordinary use, may be pleaded as of right (s. 84); such others as may be necessary are only to be pleaded, by leave of the court or a judge, on an affidavit of their truth, if it be required (s. 81). If the defendant plead several pleas without such leave, where it is required, the plaintiff may sign judgment.

The plaintiff, it has been observed, is allowed but one count for each cause of complaint: so the defendant is allowed but one plea for each separate ground of defence; and the plaintiff, again, but one replication for each separate ground of answer to the plea; and so throughout the whole course of the proceedings; for several pleas, replications, or subsequent pleadings (or, in replevin, several avowries or cognisances,) founded on the same ground of answer or defence, are not to be allowed. But on an application to the court or a judge to strike out any count, or on an objection taken before the judge, on a summons to plead several matters, to the allowance of several pleas, replications, or subsequent pleadings (avowries, or cognisances,) on the ground of such counts or other pleadings being in violation of this rule, the court or the judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings (or such avowries or cognisances,) founded on the same ground of answer or defence, as may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs and otherwise, as the court or judge may think fit.^(t)

When no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count, plea, replication, or subsequent pleading (avowry, or cognisance,) on the record, founded on the same cause of action, or ground *of* answer or defence, and the judge before whom the cause is tried at the trial certifies to [*229] that effect on the record, the party so pleading will be liable to the opposite party for all costs occasioned by such count, plea, or other pleading

^(s) But a defendant ought not to traverse vexatiously every allegation open to a traverse. See observations of Lord Campbell in *Cooling v. Great Northern Railway Company*, 12 Q. B. 485; and *South-Eastern Company v. Hibblewhite*, 12 A. & E. 447.

^(t) R. G. T. T. 1853, 2.

in respect of which he has failed to establish a distinct cause of action, or distinct ground of answer or defence, including those of the evidence as well as those of the pleadings.^(u)

As the plaintiff, instead of being confined to one single replication, may now traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or, admitting some part or parts thereof, deny all the rest, or deny any one or more allegations (s. 77); or plead several separate replications; so the defendant may, in like manner, deny the whole or part of a replication, or subsequent pleading of the plaintiff (s. 78).

Formerly, as I have stated above, it was not permitted to a party to demur and plead, by way of traverse or otherwise, to the same pleading at the same time. A defendant could not, for instance, answer a declaration, first, by demurring, for that it showed no cause of action, and, secondly, by pleading in confession and avoidance, that the plaintiff had released the action. An objection in point of law could not be raised along with an issue in fact. This is not so now; but, to prevent the right of pleading and demurring together from being abused, a party can only plead and demur to the same pleading, at the same time, by leave of the court or a judge; and he may be required to make an affidavit of the truth of the pleas, and of his belief of the validity of the objections raised by the demurrer (s. 80) before being allowed to plead in this way; so that the general rule remains unaltered, that a party must either demur or plead. He may do both, exceptionally, i. e., by leave of the court or a judge, who must be satisfied that the party, applying for leave to do so, has good grounds for making the application before leave will be granted.

[*230] *To any declaration, plea, replication, or other pleading, it will be recollected, however, the party who is to answer it, may of right demur for insufficiency in point of law. It will be more convenient, therefore, to complete at present the enumeration of the ordinary pleadings in an action, and to treat of the demurrer in a subsequent chapter.

The plea in bar of the action, then, is either a traverse, or in confession and avoidance.

A traverse is usually pleaded by the general issue, which denies at once the whole declaration, without offering any special matter whereby to avoid it. As when the defendant, in an action of debt, pleads, "that he never was indebted as alleged;" or in assumpsit, "that he did not promise as alleged;" in covenant, "that the alleged deed is not his deed;" or in trespass, or case, "that he is not guilty." These pleas are termed the *general issue*, because by making a direct traverse of what is alleged in the declaration, they amount at once to an *issue in fact*, to which the plaintiff can do nothing but reply—"that he joins issue on the defendant's plea."

But it must not be understood that by the general issue the defendant

(u) R. G. T. T. 1853, 3.

traverses every averment in the declaration, which, as involving a matter of fact, is therefore traversable. He thereby traverses only the particular fact, or facts, from which the law raises or implies an obligation on him, to pay the plaintiff the sum he claims. Thus, in actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorised by act of parliament to sue or be sued as nominal parties, the *character* in which the plaintiff or defendant is stated on the record to sue or be sued is not in any case in issue, unless specially denied.(v)

In actions on simple contract, the plea of non assumpsit operates only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, *promise, or [*231] agreement alleged may be implied by law. In an action on a warranty, for example, such a plea will operate as a denial of the fact of the sale and of warranty having been given; but not of the breach, or that the goods were not such as they were warranted to be. In an action against a carrier, for not delivering goods, such a plea will operate as a denial of any express or implied contract to the effect alleged in the declaration; but not of the breach, or that the carrier did not deliver the goods.

In actions to which the plea of "never was indebted" is applicable, this plea operates as a denial of those matters of fact, from which the liability of the defendant arises; *exempli gratiâ*, in actions for goods bargained and sold, or sold and delivered, the plea operates as a denial of the bargain and sale, or sale and delivery, in point of fact only.(w)

In actions upon bills of exchange and promissory notes, the plea of "non assumpsit" and "never indebted" are inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *exempli gratiâ*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.(x)

In actions on specialties and covenants, the plea of non est factum operates as a denial of the execution of the deed in point of fact only. All other defences must be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.(y)

In an action for detaining goods, the plea of non detinet operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein.(z)

In the same way, although after a defendant has paid a debt, he is in a position to say that "he owes nothing," such a plea is not allowed,(a) as under it *defendants used formerly to set up every imaginable matter of discharge. The defendant once owed the debt, and as [*232] he cannot therefore say "he never was indebted as alleged," he must plead the payment specially in bar of the action.(b)

These various rules of pleading apply to the general issue in actions ex contractu. The plea of "not guilty" in actions for torts is limited

(v) R. G. T. T. 1853, 5.
(x) *Ib.* 15.

(w) *Ib.* 6.
(*) *Ib.* 11.

(z) *Ib.* 7.
(b) *Ib.* 12.

(y) *Ib.* 10.

in a similar way; for in these actions such a plea operates as a denial only of the breach of duty, or wrongful act, alleged to have been committed by the defendant, and not of the facts stated in the declaration by way of inducement.

Thus in an action for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty operates as a denial only, that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and does not operate as a denial of the plaintiff's occupation of the house.

So in an action for obstructing a right of way, such a plea operates as a denial of the obstruction only, and not of the plaintiff's right of way.

So in an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty operates in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it does not operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged.

So in an action for an escape, it operates as a denial of the default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

So in an action against a carrier, the plea of not guilty operates as a denial of the loss or damage, but not of the receipt of the goods by the [233] defendant as a *carrier for hire, or for the purpose for which they were received.(c)

All other pleas in denial must take issue on some particular matter of fact alleged in the declaration; for, as we have already seen, every averment therein contained may be traversed by the defendant.

In actions for trespass to land, the plea of not guilty operates as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, which, if intended to be denied, must be traversed specially;(d) and in actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty operates as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein.(e)

One object of all these rules is to attain that precision which is found so essential, in order to develop the fact in issue between the parties, and thus attain the end of all pleading whatever.

With this view it is required that in every case in which the defendant pleads the general issue, intending to give the special matter in evidence, by virtue of an act of parliament (which justices of the peace, constables, and numerous other persons having public offices, when sued for anything done in virtue of their office, are entitled to do,) the defendant must insert in the margin of the plea the words, "By Statute," together with the year or years of the reign, in which the act of parliament upon which he relies for that purpose was passed, and also the

(c) R. G. T. T. 1853, 18.

(d) Ib. 19.

(e) Ib. 20.

chapter and section of such act, and he must also specify whether such act was public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament.(f)

A traverse may also be of one or more of the averments in the plaintiff's declaration. Thus in detinue, *the defendant may [^{*284}] traverse the averment of the plaintiff's property in the goods detained. So in trespass, he may deny the property of the plaintiff in the lands trespassed on, and, in an action for an obstruction to a right of way, the plaintiff's right to the way.

Pleas in confession and avoidance must in all cases be specially pleaded. The rules of pleading require that in every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratiâ*, infancy,—coverture,—release,—payment,—performance,—illegality of consideration, either by statute or common law,—drawing, indorsing, accepting, &c., bills or notes by way of accommodation,—set-off,—mutual credit,—unseaworthiness,—misrepresentation,—concealment,—deviation, and various other defences, must be specially pleaded.(g)

The same rule holds with regard to actions of covenant on specialties, or deeds under seal,(h) and to actions of tort;(i) in both of which all matters in confession and avoidance must be pleaded specially.

I have mentioned above several of the pleas which are to be pleaded specially in actions of contract. It is impossible at present to do more. Indeed, any attempt to do so would involve the writing of a treatise on the Science of Pleading itself. I, therefore, content myself with pointing out a further distinction in the nature of pleas generally: viz., that some are in bar of the action,—others, to its further maintenance only.

The general issue is, from its nature, a plea in bar of the action. So is a plea of the Statute of Limitations, which is, "*that the alleged cause of action did *not accrue within six years* [or other period of "*limitation applicable to the case*] *before this suit.*" The pleas [^{*285}] of a *set-off* and *payment* before action in debt or assumpsit, *non est factum* in covenant, or *son assault demesne* in trespass are all pleas in bar.

Any plea again which discloses a defence arising *after action* brought, is a plea to the further maintenance of the action; formerly such a plea could not be pleaded with a plea in bar;(k) but now a plea containing a defence, arising after the commencement of the action, may be pleaded together with pleas of defences arising before the commencement of the action; but the plaintiff may confess such plea, and thereupon is entitled to the costs of the cause up to the time of the pleading of it.(l)

(f) R. G. T. T. 1853, 24.

(g) Ib. 8.

(h) Ib. 12.

(i) Ib. 17.

(k) *Suckling v. Wilson*, 4 D. & L. 167.

(l) R. G. T. T. 1853, 22.

A defence arising after the commencement of any action must be pleaded according to the fact, i. e. it must appear on the face of the plea that it arose after action brought; for any plea which does not state whether the defence therein set up arose before or after action will be deemed to be a plea of matter arising before action (s. 66.)

A final order for protection, for instance (under 5 and 6 Vict. c. 116, and 7 and 8 Vict. c. 96,) granted by a judge of a county court under 10 and 11 Vict. c. 101, may be pleaded as follows;—(m)

In the Queen's Bench

On the day of , A. D. 18

C. D. } *The defendant, by D. E. C., his attorney, says that before the*
 } *commencement of this action, a petition for the protection of*
 } *A. B. the defendant from process was according to the form of the*
 } *statutes in such case made and provided, presented by the defendant to*
 } *the County Court of , holden at , in the said county, and*
 } *thereupon, afterwards, and after the commencement of this action, that*
 } *is to say, on the day of , A. D. 18 , a final order for pro-*
 [*236] *tection and distribution was made in the matter of the said*
 } *petition by R. A. F., Esq., judge of the said County Court, duly*
 } *authorized in that behalf: and the defendant further saith that the said*
 } *several debts and causes of action in the declaration mentioned were*
 } *contracted before the date of the filing of the said petition as aforesaid.*

A plea of payment before action is evidently a plea in bar of the action. But it often happens that a defendant has not paid a plaintiff, simply because his demand exceeded that which the defendant thought was due. There can then be no general issue, except as regards the excess of the plaintiff's demand; and we have seen that if the action goes on to trial, the plaintiff will recover the amount really due, even though it should be less than the sum claimed, and of course the costs of the action. But as a defendant ought not to be compelled to litigate when he admits the demand, or to incur costs when he is ready to pay what is really due, he is permitted to pay the amount he admits into court, and to plead "Payment into court" to that extent, a plea which is in its nature to the further maintenance of the action, and, in practice, the most usual plea of that kind, and therefore of sufficient importance to justify a more special notice than I have been able to give to other pleas generally.

In all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant) the defendant may pay into court a sum of money by way of compensation or amends (s. 70); and the effect of the plea is to admit a cause of action, and that

(m) A final order for protection may be pleaded in bar to an action for debt (Platel v. Bevill, 2 Ex. 508,) but it is no defence in actions of tort. (Bevan v. Walker, 21 L. J. R. 161, Ex.)

damages to the amount paid in have been sustained by the plaintiff. It does not admit *the cause of action* alleged in the declaration.(n)

A defendant may, therefore, pay money into court, in the action of detinue, in which, however, he usually applies for a stay of proceedings on giving up the chattels, and paying nominal damages and [*237] *costs. If the plaintiff insists upon going on for substantial damages, it may be made part of the judge's order, that unless he recovers more than nominal damages, he shall pay the costs of the action; and if the plaintiff goes on for damages for the detention, this plea of payment into court will be applicable.

The defendant may pay money into court in all actions except those mentioned in the exception, which do not extend to an action for assault and battery of the plaintiff's servant. The exceptive clause "means actions where the injury to the plaintiff is the subject of the action. When the assault is upon some member of the plaintiff's family, or person in his service, the gist of the action is the loss sustained, and the case is not within the exception."(o)

It is provided that the exception shall not extend to an action for a libel, contained in any newspaper or periodical publication, in which the defendant may plead that the libel was inserted without malice, and that before action, he inserted a full apology, or had offered to publish an apology. A defendant, on filing such a plea, is at liberty to pay into court a sum of money by way of amends, in the same manner as if actions for libel had not been excepted from the personal actions, in which it is lawful to pay money into court. This special plea of apology and payment cannot be pleaded with not guilty to the same part of the declaration.(p)

The sum to be paid into court ought to be the amount claimed, with interest down to the day of the payment into court;(q) but the plea may be amended, and a further sum allowed to be paid in on an application to a judge, if the defendant fears that the previous payment into court is insufficient.(r)

The defendant is not allowed to plead any other defence to that part of the declaration to which the *plea of payment into court applies;(s) and he must plead, if it is to a part of the declaration, [*238] to such part only.

The plea must be in the following form :—

"*the defendant by his attorney [or in person, &c.], [if pleaded to part say, as to £ , parcel of the money claimed,] brings into court the sum of £ , and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.*"

The money is paid to the proper officer of each court, who gives a

(n) *Story v. Finnis*, 6 Ex. 123; *Schreger v. Carden*, 11 C. B. 851.

(o) *Newton v. Holford*, 2 D. & L. 554.

(p) *O'Brien v. Clement*, 15 M. & W. 435.

(q) *Kidd v. Walker*, 1 Dowl. 331. (r) *Donnett v. Young*, Car. & Mar. 465.

(s) *Thomson v. Johnson*, 8 Dowl. 591.

receipt for the amount in the margin of the plea, and the sum will be paid out to the plaintiff or to his attorney, upon a written authority from the plaintiff, on demand.

The defendant should take care to have the officer's receipt on the margin of the plea, as the omission may afford ground for an application to set aside the plea for irregularity ;(*t*) but taking the money out of court is a waiver of any irregularity in paying it in.(*u*)

If the plaintiff dies, the money will be paid out only to his legal representative.(*v*)

I shall mention what are the proper replications to a plea of payment into court, in the following section.

A plea must commence as follows, or to the like effect (s. 67):—

"The defendant by his attorney [or in person, or as the case may be,] says that [here state first defence.]"

It is not necessary to state in a second or other plea, that it is pleaded by leave of the court or a judge, which leave is sometimes necessary; but every such plea must be written in a separate paragraph, and be numbered, and must commence as follows, or to the like effect (s. 67):—

[*239] *"And for a second [or third, as the case may be] plea the defendant says, that [here state second, &c., defence;]"*

or if pleaded to part only, then as follows, or to the like effect:—

"And for a second [&c.] plea to [stating to what it is pleaded,] the defendant says that," &c.

This is the form prescribed for pleas by the Common Law Procedure Act, and a material variation from it, may afford ground for an application to set aside the plea, which will generally be with costs. Thus an omission in stating whether the defendant pleads in person, or by attorney, would be irregular, and afford ground for setting aside the plea, or for an amendment at the plaintiff's cost.

If a plea be pleaded to one count only of a declaration, it ought to be so framed, otherwise it will be taken to be pleaded to the whole declaration.(*w*) If a plea began with an answer to the whole declaration, but the matter pleaded answered only a part, the plaintiff might formerly have demurred. So if a plea began as an answer to a part, and contained in the body an answer to the whole, it might also have been demurred to. But now in either case it may be amended, though the plaintiff may sign judgment as to the part not answered in the beginning of the plea.(*x*)

(*t*) *Harson v. Busk*, Har. Dig. 7358.

(*u*) *Griffiths v. Williams*, 1 T. R. 710.

(*v*) *Palmer v. Reippenstein*, 1 M. & G. 94.

(*w*) *Putney v. Swan*, 2 M. & W. 72.

(*x*) 1 Wms. Saund. 28.

A plea in bar must now be pleaded within eight days after the notice to plead. A plea in abatement must be pleaded within four days. After judgment of respondeat ouster, on a plea of abatement, a defendant had only four days to plead in bar, but now he seems to have eight days, as in other cases. The eight days are reckoned exclusively of the day on which the notice is given, and inclusively of the day on which it expires, unless the last day is a Sunday, Christmas day, Good Friday, or a day appointed *for a public fast, or thanksgiving, in which case the [*240] time is reckoned exclusively of that day also.(y)

We have seen that no plea can be delivered between the 10th of August and the 24th of October. A plea delivered within this period is a nullity, and the plaintiff may, after the time for pleading has expired, sign judgment.(z) If the time for pleading has not expired before the 10th of August, the party has the same number of days for pleading after the 24th of October, as if the preceding pleading had been delivered or filed on the 24th of October.(a) If the time for pleading expires on the 10th of August, judgment cannot be signed till the expiration of the time limited for pleading after the 24th of October.(b)

A defendant is allowed the same time for pleading after the delivery of particulars under a judge's order which he had at the return of the summons, unless otherwise provided for in such order.(c) If a summons for particulars be taken out, the time for pleading runs on until it is returnable. If particulars be then ordered, the time for pleading ceases to run again until these are delivered. When delivered, the defendant has the same time to plead as he had at the time the summons was returnable. If the summons be dismissed, the time runs on as if there had been no summons. In a summons for particulars, the defendant should, at the same time, apply for "further time to plead," and get it made part of the order that that time be "after delivery of particulars."(d) If a summons is taken out for time to plead, and is dismissed, the party has the remainder of the day on which it is dismissed to plead.(e)

Where an amendment of any pleading is allowed, no new notice to plead thereto is necessary; but the *opposite party must plead [*241] to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever last expires, unless otherwise ordered by the court or a judge; and in case the amended pleading has been pleaded to *before* amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the court or a judge allows, the pleadings originally pleaded thereto will stand and be considered as pleaded in answer to such amended pleading (s. 90).

If the plaintiff gives the defendant more time to plead than he is entitled to, the defendant is entitled to the time so given.(f)

(y) R. G. H. T. 1853, 174.

(z) Mills v. Brown, 9 Dowl. 151.

(a) R. G. H. T. 1853, 9.

(b) Severin v. Leicester, 12 Q. B. 949.

(c) R. G. H. T. 1853, 21.

(d) Adams v. Drummond, 1 Dowl. 99.

(e) Mengens v. Perry, 15 M. & W. 537; Evans v. Senior, 4 Ex. 818.

(f) Solomon v. Parker, 2 Dowl. 405.

If the defendant does not plead within the proper time, the plaintiff is entitled to sign judgment, as for want of a plea; which, however, may, as we have already seen, be set aside on equitable terms, and the defendant admitted to plead.(g)

7. The Replication.

The defendant having pleaded, the plaintiff must next answer the defendant's pleas, which he does by a replication thereto.(h) At common law, as has been formerly stated, a plaintiff is allowed but one replication to each plea; but now, by leave of the court or a judge, and on an affidavit of their truth, if it be required, he may plead in answer as many several matters, as he may think necessary to sustain his action (s. 81).

And the rules of pleading which I have mentioned while treating of the plea, apply, as may have been observed, to the replication and all [*242] subsequent *pleadings. The plaintiff may reply either by a traverse, or by averring fresh matter of fact in confession or avoidance, or of course by a demurrer, if the plea be insufficient in law.

Should his replication be in denial merely of the whole or any part of the plea—and he may traverse all or any of the defendant's allegations therein (s. 77)—he may do this by joining issue thereon, which joinder of issue may be as follows, or to the like effect:—

“The plaintiff joins issue upon the defendant's first [&c., specifying what or what part] plea;”

which form of joinder of issue is deemed to be a denial of the substance of the plea, and an issue thereon (s. 79).

If, again, the plaintiff replies by averring fresh matter in confession and avoidance of the plea, this must be specially pleaded. Thus, supposing the defendant to have pleaded a “release” or a “set-off,” the plaintiff must reply specially, *“that the alleged release was procured by the fraud of the defendant,”* or *“that the alleged set-off did not accrue within six years before this suit.”*

When the replication is in direct denial of the defendant's plea, the plaintiff is not, however, bound to select the form of “joining issue.” Thus, to a plea in abatement for the nonjoinder of a defendant,(i) the plaintiff may reply specially, that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent

(g) Ante, p. 183.

(h) If the plaintiff finds that he has misconceived his action, and cannot amend, he may *discontinue*. It is not necessary to obtain the defendant's consent; but the rule to discontinue, which is drawn up by the master, on the application of the plaintiff, must contain an undertaking on the part of the plaintiff to pay the costs, and a consent that, if they are not paid within four days after taxation, defendant shall be at liberty to sign judgment of non pros. (R. G. H. T. 1853, 23.)

(i) Ante, p. 222.

debtors (3 and 4 Will. IV., c. 42, s. 49;) or he may reply by a traverse, as follows :—

In the Queen's Bench :

On the day of , A. D.

A. B. } *The plaintiff saith that the said G. H. was not, at the time of*
 v. } *the commencement of this suit, resident within the jurisdiction*
 C. D. } *of this court, as alleged.*

Or, by a traverse of another allegation :—

** The plaintiff says that the said debt was not contracted by* [*243]
the defendant jointly with the said G. H.

Or in the form of joining issue :—

The plaintiff joins issue on the defendant's plea.

The effect of this joinder of issue is to deny the substance of the plea; i. e., that the contract was joint. The plaintiff may, however, deny both the allegations of the plea, and plead the first and second of the above replications, or the first and third together.

In all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it [as in the instances just given, of a traverse by the plaintiff of the residence within the jurisdiction of a defendant whose nonjoinder has been pleaded, or the other averment, of the debt having been contracted jointly with such defendant,] the plaintiff may add a joinder of issue for the defendant (s. 79).

This is called adding the similiter. Formerly when a party joined issue on a matter of fact, he was obliged to add, "and of this the defendant [or plaintiff] puts himself upon the country;" meaning that he left the determination of the truth of the fact to the jury. His opponent then added, "and the defendant [or plaintiff] doth the like;" meaning that he was equally willing to leave the fact to be determined by the jury. The next step in the cause after this joinder of issue was to send that issue for trial by the jury; and it was and is the duty of the plaintiff to make up the issue and deposit it with the proper officer for trial. The plaintiff must at the same time deliver a copy of the issue to the defendant. When the plaintiff, then, traverses a fact averred by the defendant, by which he must necessarily raise an issue in fact, and as necessarily put himself upon the country, all that is required is the defendant's similiter, to complete the issue, before the plaintiff makes it up and delivers it to the defendant, as the issue for trial. The plaintiff has long been allowed to deliver the issue at once, i. e., to pass over, in this particular *case, the formal delivery to the defendant of a [*244] separate replication, and the formal redelivery by the defendant to him of a joinder in issue. He now delivers the copy of the issue for
 MARCH, 1854.—12

trial at once, and it contains his replication, and a similiter added by him for the defendant.

The defendant may strike out the similiter or joinder of issue, and plead or demur to the plaintiff's last pleading, within four days. If he does so, he must give notice thereof to the plaintiff as follows:—

In the Queen's Bench:

Between $\left\{ \begin{array}{l} \text{A. B., plaintiff,} \\ \text{and} \\ \text{C. D., defendant.} \end{array} \right.$

Take notice, that I do not receive the issue delivered by you in this cause, but consider the same as a replication [or other pleading, as the case may be] only. I have struck out the joinder in issue to the replication [or other pleading,] and demurred [or pleaded] to that replication [or other pleading.] Dated this day of 18 .

Yours, &c.,

D. E. C., defendant's attorney
[or agent.]

To Mr. H. J. S., plaintiff's
attorney [or agent.]

The joinder of issue added by the plaintiff is generally added, as I have pointed out above, in cases where he at once makes up and delivers the issue, with a notice of trial indorsed.

If, therefore, the joinder in issue be struck out, the plaintiff cannot proceed to trial. If the defendant do not plead within due time, the plaintiff's course is to sign judgment.(k)

A replication either taking or tendering an issue in fact is generally pleaded to a plea in bar of the action. Such a replication may no doubt be pleaded to a plea to the further maintenance of the action, but, as a general rule, the plaintiff confesses such a plea, and recovers his costs up to the time of pleading *it, as we have seen he may do.(l) [*245] This course is one almost invariably adopted in replying to the plea of "payment into court." Having treated at large of that plea in the last section, I must now state what are the usual replications to it.

The plaintiff, then, after the delivery of a plea of payment of money into court, is at liberty to reply by accepting the sum in satisfaction of the cause of action, in respect of which it has been paid in, and he is at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed (s. 73).

In such case the replication may be in this form:—

In the Queen's Bench:

On the day of , A. D. 18 .

A. B. } And the plaintiff accepts the said sum of £ out of the
v. } court here, in full satisfaction and discharge of the cause [or if
C. D. } several counts, causes] of action in the declaration mentioned.

(k) Twycross v. King, 6 Q. B. 663.

(l) Ante, p. 235.

The plaintiff may, however, reply that the sum paid into court is not enough to satisfy his claim, in respect of the matter to which the plea is pleaded (s. 73); and, in the event of an issue thereon being found for the defendant, the defendant is entitled to judgment and his costs of suit.

In this case the plaintiff should reply in the following form, and at the same time make up and deliver the issue as in ordinary cases:—

A. B. } *And the plaintiff says that the said sum of £ so paid into*
 v. } *court here is not enough to satisfy the claim of the plaintiff in*
 C. D. } *respect of the cause [or causes] of action in the declaration*
mentioned.

If the defendant's plea be pleaded to a part only of the declaration, as it usually is, and there are other pleas to the residue (for if there are not, the plaintiff may sign judgment for such unanswered part of the *declaration,) the plaintiff must then determine whether he will be satisfied with the sum paid into court, or go on with the [246] action.

If he determines on accepting the sum in satisfaction of the action, he ought to reply by accepting that sum in satisfaction of that part of the declaration to which the plea is pleaded; and if he does so, he must at the same time add a nolle prosequi as to the residue, for otherwise the defendant may sign judgment of non pros.(m)

A nolle prosequi is added to the plea in this form:—

And as to the residue of the declaration, the plaintiff says that he will not further prosecute his suit against the defendant in respect of the residue of the cause [or causes] of action in the declaration mentioned: therefore as to the said residue of such cause [or causes] of action, let the defendant be acquitted and go thereof without day, &c.

Upon this the plaintiff may tax his costs, as in the former case, but the defendant is entitled to the costs of that part of the declaration and plea or pleas to which the nolle pros. is entered.(n)

If the plaintiff resolves to go on with the action, instead of entering a nolle pros., he should reply to the other pleas of the defendant, and in this case he will not be entitled to tax his costs,(o) which he will not ultimately recover unless successful in the action.

The replication must be entitled of the court and be dated of the day on which it is delivered. The plaintiff must reply within four days after a notice to do so, which is usually indorsed on the plea as the notice to plead is indorsed on the declaration,(p) but which may, like it, be delivered separately.

The plaintiff may apply for further time to reply on showing facts to

(m) Emmett v. Standen, 6 Dowl. 591.

(n) Goode v. Goldsmith, 5 Dowl. 288.

(p) Ante, p. 213.

(o) Cauty v. Gill, 4 M. & G. 907.

[*247] justify the application; and on *obtaining it he has not hitherto been put under terms.(q)

If he does not reply in proper time, the defendant may sign judgment of non pros., but this the defendant must always do bona fide; for if a party deliver a pleading after the time for doing so has expired, but before the opposite party has signed judgment, a judgment of non pros., signed after such delivery, will be set aside.(r)

8. *The Rejoinder.*

As the plaintiff may reply several matters to the defendant's pleas, so the defendant may rejoin several matters to a replication. He can only do so, however, by leave of the court or a judge, and he may be required to make an affidavit of the truth of his rejoinders. The defendant must rejoin after a four-day notice, as in the case of a replication (s. 81); or the plaintiff may sign judgment. He may traverse the whole or any part of a replication (s. 78), just as the plaintiff may deny the whole, or any part of a plea.

The similiter added by the plaintiff, in certain cases, is practically a rejoinder, and it is rare indeed that a rejoinder takes any other shape than that of a joinder of issue. Thus to the replications of "fraud," and "the Statute of Limitations," given on a previous page,(s) the defendant can only rejoin by a traverse. If, however, he has fresh matter of fact to aver, it must be pleaded specially, according to the rule I have so frequently alluded to.

The further steps in pleading are called the surrejoinder, rebutter, and surrebutter. Any further pleadings have no distinctive appellations.

The whole of this process for arriving at an issue in fact (or by demurrer, an issue in law,) is denominated the *Pleading*.

[*248] *I have pointed out as I went along the leading rules to be observed in framing each separate proceeding; but there is one general rule which I have not yet noticed, viz., that in all the stages of pleading, care must be taken not to depart or vary from the original right of action or defence which the party has once insisted on. "For this (which is called a *departure* in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea without departing out of it. "As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made; therefore he has

(q) *Crutchley v. L. and B. Railway Company*, 2 D. & L. 102.

(r) *Gray v. Pennell*, 1 Dowl. 120.

(s) *Ante*, p. 242.

"now no other choice, but to traverse the fact of the replication, or else
"to demur upon the law of it."

A departure may give rise to either a demurrer, or an application to the court or a judge, to set aside or amend the pleading.

9. *New Assignment.*

In some cases, however, the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea, reduce that general wrong to more particular certainty, by assigning the injury afresh with its specific circumstances, in such a manner as to identify it consistently with his general complaint. This is called a *new assignment*; it partakes somewhat of the nature of a declaration, and may arise in two ways,—either where the plaintiff complains of one of several trespasses in a form so general, that the declaration is applicable to any one of them, and a trespass, in respect of which the action is not brought, is (by mistake or design) justified by the defendant; or where the defendant having pleaded a justification of the trespass complained of, the plaintiff maintains *that there has been an excess beyond [*249] what the circumstances justified. In the first case, the defendant may have been misled; and if he was so, he is clearly entitled to plead an answer to any trespass, which corresponded with the plaintiff's description. In the second instance, the defendant is bound to answer the plaintiff's *prima facie* case, and cannot be held to surmise and answer an excess in the exercise of his legal right, to which excess his attention had not as yet been directed. In either case it is necessary for the plaintiff to *new assign*, or assert, in answer to the plea, in the first case supposed, the other trespass really complained of,—in the second instance given, the excess of which the plaintiff complains. The defendant must of course have an opportunity of answering either assertion. Although this seems capable of being effected by short and simple statements, the former technical system of pleading created great and unnecessary prolixity in so doing. Thus, to an action of trespass the defendant formerly would plead four defences: 1st, a right of way; 2nd, a right of common; 3rd, a right to take wood for repairing his house; and 4th, a right to take wood for his fire. The plaintiff would *new assign* to each plea, that he brought his action for trespasses different from those justified in that particular plea; the defendant would thereupon plead to each *new assignment*, the three defences not contained in the plea to which there was the *new assignment*. The pleadings would thus go on until each plea was repeated four times over in almost the same words. There was no real necessity for this. If a defendant, in answer to an alleged trespass, asserts, 1st, a right of way; and 2nd, a right of common: and the plaintiff complains of something not justified by either or both, he must now say so expressly; and not say separately to each plea that he complains of something not justified thereby; for whatever be the number of pleas a defendant now pleads to the same cause of action, there can be but one *new assignment* (s. 87); which must state

[*250] that the plaintiff proceeds for causes of action different *from those justified. The defendant is not, without the leave of the court, to plead to the causes of action newly assigned, any justification previously pleaded, except a plea in denial (s. 88). Consequently, if a defendant now pleads but one defence at first, and the plaintiff new assigns, the defendant may then plead his next defence, and so on, putting each defence once only on the record. If the defendant pleads all his defences in the first instance, which is the usual course, the plaintiff will new assign once for all, and the defendant must then either deny the causes of action newly assigned, pay money into court, or suffer judgment by default.

A new assignment, though in effect a declaration, is in the nature of a replication, and must be delivered within the same time. The plaintiff must give the defendant notice to plead thereto, and the time for pleading to the new assignment will be eight days, as in the case of a declaration (ss. 62, 63).

With any forms of new assignments that might be given here, it would be necessary to enter at some length into the law on the subject, a disquisition which would necessarily partake more of the nature of a treatise on this branch of the science of pleading, than of an elementary view of the proceedings in an action at law.

Objections to the pleading of several pleas, of several replications, or of several rejoinders, are heard, and finally decided by a judge at chambers, when the party applies for leave to plead them (s. 83). Pleadings framed to prejudice, embarrass, or delay the fair trial of the action are, we have seen, to be struck out or amended (s. 52). Pleadings insufficient in law may be demurred to; or if the opposite party obtains leave so to do, demurred to and pleaded to at the same time (s. 80). If a party plead otherwise than as the rules of pleading require, he exposes himself to have such pleading set aside or amended at his cost; while if either party plead several pleas, replications, or other pleadings, without [*251] the leave of the court or a judge, when such *leave is necessary, the opposite party may sign judgment. The judgment so signed may, no doubt, be set aside, upon an affidavit of merits, but it is generally only on payment of costs.

Finally, if one party demur, and the other join in demurrer, which he cannot avoid doing, unless he withdraws his demurrer, there is at once an issue in law. If one party traverse, the other party must generally join issue. This raises an issue in fact. So a plea in confession and avoidance must be traversed, in some material averment, or demurred to; and in this way the parties must, sooner or later, arrive at an issue in fact. The object of the pleadings thus accomplished, the next step is the trial of these issues, which I shall now proceed to describe.

CHAPTER VIII.

DEMURRER.

WE have now arrived at that stage of the action when the issues raised by the pleadings must be determined. These issues, we have seen, are either upon matter of law or upon matter of fact, and may be raised at any stage of the pleadings. If the declaration be insufficient in law, as by not averring that the plaintiff sues for "money," (a) the defendant may demur to it. He thereby admits the facts stated to be true, but denies that by the law arising upon these facts the plaintiff can sustain a claim for the amount sued for. So, if the defendant, attempts to set-off a debt accrued to him from the plaintiff since the action, (b) the plaintiff may demur to the plea. It seems, therefore, more convenient at present to dispose of the proceeding on demurrer, before I come to treat of those which take place on the trial of issues in fact.

If either party have pleaded and demurred together, *which, [*252] in some cases, as we have seen, a party may be permitted to do, (c) the court or a judge will direct which issue is to be first determined (s. 80). The rule by which the course of proceeding in this case is regulated is extremely simple. If the result of the demurrer, if found for the party demurring, would be such as to put an end to the action (as, for instance, if it be a demurrer to the declaration,) as there will be no use, should the judgment be for the defendant, to try the issues in fact, the demurrer will be first disposed of. So, if the demurrer is merely to some one or more of several pleas, and any one of the other pleas on which issue has been joined, if found by the jury for the defendant, would put an end to the action, it is clear, that it will be more convenient to dispose of the issues in fact first.

The proceedings on a demurrer are exceedingly simple, and the best mode of describing them appears to be, to do so in the order in which they occur in practice. A demurrer like any other pleading, then, is entitled in the court, and dated of the day of its delivery; and it must be delivered within the time allowed to the party to plead, reply, or rejoin, as the case may be. The prescribed form of a demurrer is as follows:—

In the Queen's Bench :

*The day of in the year of our Lord
one thousand eight hundred and fifty-three.*

C. D. } *The defendant, by H. J. S. his attorney [or in person,*
ats. } *or the plaintiff] says that the declaration [or plea, or*
A. B. } *replication] is bad in substance.*

*The matter of law intended
to be argued in support of
this demurrer is [state it].*

(a) Ante, p. 205.

(b) Ante, p. 196.

(c) Lumley v. Gye, 22 L. J. R. 9 Ex.; Week. Rep., 1852-53, 39.

In the margin of the demurrer some substantial matter of law intended to be argued must be stated; for if any demurrer be delivered without such statement, or with a frivolous statement, it may be set [*253] aside by *the court or a judge, and leave given to sign judgment as for want of a plea (s. 89).

This statement must not be a mere repetition of the demurrer; it must state some special grounds for argument, as in the case of *Bonsi v. Stewart*, 7 M. & G. 746.

The marginal note is for the information of the court, not of the parties: the want of the statement in the margin is therefore no ground for objecting to the demurrer being argued. It only affords ground for setting it aside; (d) and a defective marginal note may be amended on payment of costs, (e) and the case postponed to allow points for argument to be stated. (f)

The application to set aside a demurrer as frivolous, must be made on an affidavit referring to the pleadings, and setting them out. (g) It must be made promptly, as advantage cannot be taken after a joinder in demurrer, and notice of trial of issues in fact; (h) but a frivolous demurrer is not a mere irregularity, waived by applying for further time to reply to it. (i)

The party demurring, in order to obtain a joinder in demurrer, must give a notice to the opposite party to join in demurrer in four days, which notice may be delivered separately, or indorsed on the demurrer.

If indorsed, it may be in this form:—

"The defendant is to join in demurrer in four days, otherwise judgment."

H. J. S., Plaintiff's Attorney."

The party whose pleading is demurred to may apply for leave to amend to the court or to a judge at chambers. This is generally only allowed on payment of the costs of the demurrer; but the judge at chambers may give nominal costs, and the court will not review his decision. (k)

*If an amendment be permitted, the opposite party must, as [*254] we have already seen, (l) plead de novo.

If he does not amend, he must join in demurrer, in four days. The joinder should be entitled and dated as other pleadings; and must be in this form (s. 89).

In the Queen's Bench:

*The day of , in the year of our Lord
one thousand eight hundred and fifty-three.*

A. B. } *The plaintiff, [or defendant] says that the de-*
v. } *claration [or plea or replication] is good in sub-*
C. D. } *stance.*

(d) *Lacy v. Umbers*, 3 Dowl. 732.

(f) *Parker v. Riley*, 3 M. & W. 230.

(h) *Norton v. Mackintosh*, 7 Dowl. 529.

(k) *Tomlinson v. Ballard*, 4 Q. B. 642.

(e) *Ross v. Robeson*, 3 Dowl. 779.

(g) *Daniel v. Lewis*, 1 Dowl. N. S. 542.

(i) *Cutts v. Surridge*, 9 Q. B. 1015.

(l) *Ante*, p. 240.

An issue in law is thus raised for the opinion of the court, to obtain which it is necessary to prepare what are called the *demurrer books*. This is simply a copy of the pleadings commencing with the declaration, and concluding with the joinder in demurrer.

When there is a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates, are to be copied into the demurrer books. If any other parts are copied, the master will not allow the costs thereof on taxation, either as between party and party, or as between attorney and client.^(m)

The demurrer is then set down for argument in the *special paper*, which is a list, kept in each of the courts, of the causes to be argued on particular days specially set apart for such arguments. This is done at the request of either party, four clear days before the day on which the demurrers are to be argued.⁽ⁿ⁾

Notice thereof must be given forthwith by the party who has set down the demurrer for argument, to the opposite party, which must be given in sufficient time to enable him to prepare for the argument.^(o) It is irregular to deliver a joinder in demurrer, *and at the same [*255] time a notice that it has been sent down for argument.^(p)

Four clear days before the day appointed for argument, the plaintiff must deliver copies of the demurrer book, with the points intended to be insisted on, to the Lord Chief Justice, or Lord Chief Baron, as the case may be, and the senior puisne judge of the court; and the defendant must deliver copies to the other two judges of the court next in seniority. In default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default will not be heard until he has paid for such copies, or deposited with the Master a sufficient sum to pay for them. If the statement of the points have not been exchanged between the parties, each party must, in addition to the two copies left by him, deliver also his statement of the points to the other two judges, either by marking the same in the margin of the books delivered, or on separate papers.

If all the demurrer books are not delivered, the court may strike the cause out of the special paper, in which case it must be again set down for arguments as if nothing had been done.

The cause is called on, in its order, on some one of the days appointed for hearing cases that have been set down in the special paper. The counsel for the party who has demurred addresses the court first; the counsel who supports the pleading is heard after him, and the first then replies. Only one counsel is generally heard on each side. On the conclusion of the arguments, the court gives judgment,—for the plaintiff that he recover [which, as I have pointed out, is an interlocutory judgment only,] or for the defendant, that the plaintiff take nothing by his writ, and that the defendant recover his costs of suit.

(m) R. G. H. T. 1853, 17.

(n) Ib. 1853, 15.

(o) Britten v. Britten, 2 Dowl. 239.

(p) Gibbons v. Mottram, 1 D. & L. 815.

The court sometimes offers to the party, whose pleading has been demurred to, leave to amend, on *payment of costs. This is generally done in the course of the argument; for it is not usual to allow a party to amend, after judgment on demurrer has been given against him. Sometimes, however, the court will allow this to be done. So the party may be allowed to withdraw his demurrer; this being done generally on the terms of his paying the costs, and pleading *issuably instantanter*.(q)

After judgment, the party in whose favour it has been given is entitled to issue a writ of inquiry, and on its return, to sign final judgment,(r) and issue execution for the sum awarded him.

Execution may, however, be stayed, if the party against whom judgment is given brings error; but error and execution will be more appropriately treated of in subsequent chapters.

CHAPTER IX.

TRIAL.

SUCH being the mode in which an issue in law is determined, I return to a consideration of the steps to be taken for the determination of the questions of fact raised by the pleadings. I must again diverge for a moment to mention merely the proceedings on a special case.

1. *Special Case.*

We have already seen that if the parties can agree upon the precise question in dispute between them, whether it be on a matter of law or a matter of fact, they may have that question determined without any pleadings whatever.(a) When they have evolved the disputed questions by their respective pleadings, and are at issue, they have another opportunity, if they *can agree upon the facts only, of avoiding the expense, delay, and risk of a trial. They may, by consent and order of a judge, "state the facts in a special case for the opinion of the court, and agree that a judgment shall be entered for the plaintiff or defendant by confession or *nolle prosequi* immediately after the decision of the case" (3 and 4 Will. IV., c. 42, s. 25).

A special case, if agreed upon, is settled and signed by the counsel of the parties, and then set down for argument in the special paper precisely as is a demurrer, notice being given to the opposite party, and copies of the special case delivered to the judges in the same way as the demurrer books.(b) After the argument by counsel judgment is given as on a demurrer. On this judgment execution issues as in ordinary cases, and cannot be stayed; for the decision of the court on a special case is final, and error cannot be brought on the judgment.

(q) *Underhill v. Harney*, 3 Dowl. 495.

(a) *Ante*, p. 190.

(r) *Ante*, p. 45.

(b) *R. G. H. T.* 1853, 15, 16.

If the parties, however, cannot, or do not agree upon the facts, there is but one way of deciding between them, viz., by the trial.

2. *Modes of Trial.*

There are four modes of trial, each appropriated to the different kinds of questions to be thereby determined.

1. *The Trial by Certificate* is allowed in cases when the evidence of the person certifying is the only proper criterion of the point in dispute. "For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averment or information of persons in such a station as affords them the most clear and competent knowledge of the truth. As, therefore, such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuitry, permits the fact to be determined upon such certificate merely." Thus the customs of the city of London are tried by the certificate of the mayor and *aldermen, certified by the mouth of their recorder, [*258] "as the custom of distributing the effects of freemen deceased; of enrolling apprentices; or that he who is free of one trade may use another; if any of these or other similar points come in issue. But this rule admits of an exception, where the corporation of London is party or interested in the suit; as in an action brought for a penalty inflicted by the custom; for there the reason of the law will not endure so partial a trial. But this custom shall be determined by a jury, and not by the mayor and aldermen, certifying by the mouth of their recorder. In some cases the sheriff of London's certificate shall be the final trial; as if the issue be, whether the defendant be a citizen of London or a foreigner, in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the university, when the chancellor claims cognizance of the cause, because one of the parties is a privileged person. In this case the charters, confirmed by act of parliament, direct the trial of the question, whether a privileged person or no, to be determined by the certificate and notification of the chancellor under seal; to which it hath also been usual to add an affidavit of the fact. But if the parties be at issue between themselves, whether A. is a member of the university or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellor's certificate." Certain matters of ecclesiastical jurisdiction are, in certain cases, tried by the bishop's certificate. If "on a writ of dower the heir pleads no marriage, or if the issue in a quare impedit be, whether or no the church be full by institution; these, being matters of mere ecclesiastical cognizance, shall be tried by certificate from the ordinary. *Ability* of a clerk presented, *admission*, *institution*, and *deprivation* of a clerk, shall also be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge; but *induction* shall be tried by a jury, because it is a matter of public notoriety, *and is likewise the corporal investiture of the temporal profits. *Resignation* of a [*259] benefice may be tried in either way; but it seems most properly to fall

"within the bishop's cognizance. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and what return was made on a writ by the sheriff or under-sheriff shall be only tried by his own certificate."

2. *The Trial by the Record*, which takes place when issue is joined upon the existence or non-existence of a particular record; as when a defendant pleads to a declaration on a judgment in a court of record, that there is no such record. We have seen that it is a maxim of the law, that a record can only be tried by itself, it admits of no contradiction; (c) therefore on an issue of nul tiel record, the court awards a trial by an inspection and examination of the record. Thus, if to an action on a judgment the defendant pleads—

In the Queen's Bench:

	<i>The</i>	<i>day of</i>	<i>in the year of our Lord one thousand eight hundred and fifty-three.</i>
C. D.	}	<i>The defendant, by H. J. S., his attorney, says that there is</i>	
ats.		<i>not any record of the said supposed recovery remaining in the</i>	
A. B.		<i>said court.</i>	

The plaintiff will reply after the formal commencement—

that there is such a record of the said recovery remaining in the said court, and he prays that the said recovery may be seen and inspected by the said court here. But because the court here are not yet advised what judgment to give of and upon the premises, the day of [the fifth day at least after the date of the replication] *is given to the parties to hear judgment thereon, for that the said court here are not yet advised thereof, &c.*

On a replication or other pleading denying the existence of a record pleaded by the defendant, four days' notice must be given to the defendant, requiring him to produce the record, otherwise judgment. (d)

[*260] *On the day of trial, which must be in term, as the issue can be tried only by the court in banco, the record is brought into court and read. The party pleading it is bound to produce it. If it is a record of the court in which the action is brought, it is brought from the treasury of the court by one of the masters, who must have had notice to do so. If the record of an inferior court, a certiorari must be issued to bring it up to the court. If it is a record of a court of equal degree (as, for instance, if a record of the Common Pleas is required in the Exchequer,) no writ of certiorari can be issued from the latter to the former court, as one court cannot command another of equal degree. A certiorari, therefore, is issued from chancery in the name of the queen herself, who is supposed thus to send for the record, which, being certified to the queen in chancery, is from thence, by a writ of mittimus, sent to the court where it is required.

(c) Ante, p. 12.

(d) R. G. H. T. 1853, 38.

Upon inspection of the record, the court gives judgment, according as the record corresponds or not with the plea; for the plaintiff, that he recover his damages, which is an interlocutory judgment, or for the defendant, that the plaintiff take nothing by his writ.

3. *The Trial by Witnesses* without a jury, which is more rare even than the trial by certificate. An instance of it occurs where the death of the husband is denied by the tenant in an action for dower. "This being looked upon as a dilatory plea, is, in favour of the widow and for greater expedition, allowed to be tried by witnesses examined before the judges." Sir Edward Coke lays it down, that the validity of a challenge to a juror is to be thus tried, and that in every case the affirmative must be proved by two witnesses at least.

4. *The Trial by Jury*, of the nature of which, in the abstract, it is unnecessary to say anything at present.

3. *The Issue.*

When it is intended to go to trial, it is for the *plaintiff to make up the *Issue*, which ought to be in the following form:— [*261]

In the Queen's Bench:

The day of in the year of our Lord one thousand eight hundred and fifty

Middlesex.—A. B. by H. J. S., his attorney [or "in person," as the case may be, and as in the declaration], sues C. D. who has been summoned to answer the said A. B., by virtue of a writ issued on the day of , in the year of our Lord , [the date of the first writ] out of Her Majesty's Court of Queen's Bench. For [here is inserted the declaration from this word to the end, and all the pleadings, with their dates, each plea or pleading being written in a separate paragraph, and numbered the same as in the pleading delivered, but the title of the pleadings is not repeated. The conclusion is:] *Therefore let a jury come, &c.*

A copy of this issue is to be delivered to the defendant, which, if not a correct transcript of the pleadings in the action, may be returned by him, with a notice of his objection; or he may cause the plaintiff to amend it by taking out a summons at chambers for that purpose.(e)

4. *Notice of Trial.*

The next step is to give the defendant "notice of trial," which must be given ten clear days before the day of trial (s. 97), unless a shorter notice has been ordered by a judge, as in the case of the defendant having been tied down to accept "short notice" of trial, as the condition of his obtaining further time to plead.

The expression "short notice of trial," in all cases means four days;

(e) *Watson v. Humphries*, 21 L. J. R. 336, Q. B.

but a defendant is only bound to take short notice, if under terms to do so, for the next sittings. If the plaintiff allow a sittings to pass, he must give the ordinary ten days' notice.(f)

The notice of trial is generally endorsed on the issue, though it may [*262] be given in a separate paper. *It must be in writing. No particular form of words is necessary to constitute a good notice, provided it clearly informs the party in sufficient time when and where the cause is to be tried.(g) If on a separate paper, it must be entitled in the court and the cause.

The following are the usual forms of notice of trial:—

[In London.]

In the Queen's Bench:

Between { A. B., plaintiff,
and
C. D., defendant.

Take notice of trial in this cause, for the sittings within [or for the first day of the sittings after, or for the adjournment day of the sittings after, as the case may be] this present term, to be holden at the Guildhall of the city of London. Dated this day of 18 .

Yours, &c.

H. J. S., plaintiff's attorney
[or agent].

To Mr. D. E. C., defendant's
attorney [or agent].

[In Middlesex.]

[Same as above] for the sittings within [or for the sittings after] this present term, to be holden in the court at Westminster, in the county of Middlesex.

[At the Assizes.]

[Same as above] for the next assizes, to be holden at in and for the county of

Notice of trial must be given in town.(h) It must be served on the attorney in the cause, at his office, or on the defendant, if he has appeared in person.

If the plaintiff cannot be ready for trial on the day for which notice has been given, he may give notice of continuance in a town cause, because there will be a future sitting of the court, that is the Court of Nisi Prius in London or Middlesex. In country causes he must countermand his notice.

(f) *Dignam v. Ibotson*, 3 M. & W. 431.

(g) *Cory v. Hotson*, 1 L. M. & P. 23.

(h) *R. G. H. T.* 1853, 36.

*Notice of continuance must be given four days, or, after short notice, two days before the day of trial,⁽ⁱ⁾ in this form:— [^{*263}]

In the Queen's Bench:

Between $\left\{ \begin{array}{l} \text{A. B., plaintiff,} \\ \text{and} \\ \text{C. D., defendant.} \end{array} \right.$

I do hereby continue the notice of trial given by me in this cause to the next sittings within [or sittings after] this present term. Dated this day of , 18 .

Yours, &c.

H. J. S., plaintiff's
attorney [or agent].

*To Mr. D. E. C., defendant's
attorney [or agent].*

If the notice of trial is irregular or insufficient, the verdict, if the plaintiff goes to trial, and the defendant does not appear, may be set aside.^(k) But an irregularity in, or want of notice, may be waived; as by appearing at the trial^(l) or by the defendant taking proceedings to get the cause struck out of the list for trial.^(m)

It must also here be mentioned, that in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering it. In case issue is afterwards joined by the defendant, such notice is available from its date. If issue is not joined, and the plaintiff signs interlocutory judgment for want thereof, and forthwith gives notice for executing a writ of inquiry to assess the damages by being sustained, such notice operates from the time that the notice of trial was given.

In all cases, also, where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, *if he pleads in person, is obliged to accept notice of executing a writ of inquiry on the back of the [sup>*264] joinder in demurrer, in order that if judgment be given against him on the demurrer, (a judgment which I have pointed out is *interlocutory*), the plaintiff may not be, in any way, delayed in having his damages assessed on a writ of inquiry, and in obtaining final judgment against the defendant. And for the same reason, in all cases in which the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he pleads in person, is obliged to accept notice of executing a writ of inquiry on the back of the demurrer.⁽ⁿ⁾

5. Countermand of Notice.

In town causes, that is, causes where the venue is London or Middle-

(i) R. G. H. T. 1853, 36.

(k) Williams v. Williams, 2 Dowl. 350.

(l) Doe d. Antrobus v. Jepson, 3 B. & Ad. 402.

(m) Young v. Fisher, 2 Dowl. N. S. 637.

(n) R. G. H. T. 1853, 40.

sex, in which counties there are, as we have seen, frequent sittings at nisi prius, the plaintiff may continue his notice of trial. In country causes, which are tried twice in the year at the assizes, the plaintiff cannot do so. He must countermand his notice altogether.

This countermand must be given four days before the time mentioned in the notice of trial, unless short notice of trial has been given, and then two days before the time mentioned in the notice of trial, unless otherwise ordered by the court or a judge, or by consent (s. 98).

The notice must be in writing, and it may be given either in town or country, unless otherwise ordered by a judge, (o) i. e., it may be given either to the attorney in town or agent in the country, and by either. (p) But a notice to a defendant personally in the country, who appears by attorney in town, is insufficient. (q)

[*265] *A notice of countermand may be in this form :—

In the Queen's Bench :

Between $\left\{ \begin{array}{l} \text{A. B., plaintiff,} \\ \text{and} \\ \text{C. D., defendant.} \end{array} \right.$

I do hereby countermand the notice of trial given by me in this cause.
Dated this day of , 18 .

Yours, &c.,
H. J. S., plaintiff's attorney
[or agent.]

To Mr. D. E. C., defendant's
attorney [or agent.]

Although it may be too late to give a *proper* notice of countermand, a notice may, in some cases, be usefully given with a view of preventing the defendant from incurring costs.

6. *Proceedings if the Plaintiff fails to try the Cause.*

If the plaintiff fails to try the cause in pursuance of his notice, or to countermand the notice of trial in sufficient time, the defendant may obtain a rule of court for the costs of the day (s. 99), which will be drawn up by the master on affidavit, without any motion by counsel.

The following may be the form of the affidavit, as to which, see *Powell v. James*, 12 M. & W. 100; 1 D. & L. 415 :

In the Queen's Bench :

Between $\left\{ \begin{array}{l} \text{A. B., plaintiff,} \\ \text{and} \\ \text{C. D., defendant,} \end{array} \right.$

D. E. C., of , gentleman, attorney for the above-named defend-

(o) R. G. H. T. 1353, 34. (p) *Chestyn v. Pearce*, 4 Dowl. 693.
(q) *Margetson v. Rush*, 8 Dowl. 388.

ant, maketh oath and saith, that issue was joined in this cause on the day of . last, and notice of trial given [if on the issue thereon] for the last assizes holden at , in and for the county of [or for the sitting after term last, stating the fact as it was]. And this deponent further saith, that the above-named plaintiff did not *proceed to the trial of the said action pursuant to the said notice, nor did he countermand such notice in due time, according to the provisions of the Common Law Procedure Act, 1852. [*266]
Sworn, &c. D. E. C.

The "costs of the day" are the same as those which are paid on a withdrawal of the record,^(r) a proceeding which I shall have occasion to explain when I come to treat of the trial of the cause: and if the cause has been made a remanet from one sittings to another, the "costs" are the "costs of the day" of the second sittings when the default took place.^(s)

The payment of the costs may be enforced, as I have already pointed out, by execution upon the master's allocatur, under 1 & 2 Vict. c. 110.^(t)

If the plaintiff had any good excuse for not going to trial, he must move the court to discharge the rule. The necessary absence of a material witness has been held a good excuse for not going to trial.^(u)

But as the defendant may wish to bring the action to a conclusive termination, he is not without the power of doing so; for if the plaintiff neglects to bring on the cause for trial, within certain stated periods after issue has been joined, according as issue is joined in term or in vacation (unless further time has been ordered by the court or a judge), the defendant may give the plaintiff twenty days' notice, to bring on the cause for trial at the next sittings or assizes, as the case may be, after that notice. If the plaintiff, after this, neglect to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the notice given by the defendant, the defendant may suggest on the record, that the plaintiff has failed to proceed to trial, although duly required so to do (which suggestion shall not be traversable, but only be subject to be set aside if untrue,) and may sign judgment for his costs (s. 101).

*This is not, however, the only means which the defendant has in his power, of putting an end to the action; for if the plaintiff fails to bring on the trial of the cause, within the proper time, the defendant may make up the issue, and carry down the record for trial, giving the plaintiff the same notice of trial *by proviso* as the plaintiff must have given to him (s. 116). This proceeding is called *trial by proviso*, because in such a case a proviso was inserted in the writ of venire facias, which, according to the former practice, was issued previous to the trial, and commanded the sheriff to summon the jury, to the effect that, if two writs (meaning the one from the plaintiff and the other from

(r) Walker v. Lane, 3 Dowl. 504. (s) Brett v. Stone, 1 D. & L. 140.

(t) Hodgson v. Paterson, 2 Dowl. N. S. 129.

(u) Eastern Union Railway Company v. Symonds, 4 Ex. 502.

the defendant) should come to his hands, he should execute and return one only.

If records are entered for trial both by the plaintiff and the defendant, the defendant's record will be treated as standing next in order after the plaintiff's record in the list of causes, and the trial of the cause will take place accordingly (s. 116).

This is the mode by which a plaintiff is prevented from keeping a cause hanging over the head of a defendant for an indefinite time, a right to which the defendant is so absolutely entitled, that the court has refused to make a rule for a stay of proceedings, even after the defendant had become bankrupt and obtained his certificate.(v)

If the defendant does not, after his notice, proceed to trial, he will have to pay to the plaintiff the costs of the day; and when both give notice, and neither tries, they are liable to each other for these costs, unless by consent of both the cause is made a remanet.(w)

The trial *by proviso* will not, however, be often resorted to, now that the defendant has the two other remedies, I have mentioned,—the first for the costs of the day, and the second for the costs in the cause generally.

[*268]

*7. *The Nisi Prius Record.*

The plaintiff having given notice of trial, his next step is to make up the *Nisi Prius* record, which is a copy, engrossed on parchment, of the issue delivered to the defendant. This is deposited with the Associate of the court in which the cause is to be tried, with whom it remains until disposed of (s. 102). The cause is thus entered for trial, and the issue, as engrossed on parchment, becomes the "*Nisi Prius* record," by which alone the judge has power to try the issues therein joined.(x)

Causes to be entered for trial in London and Middlesex, must be entered as follows: if notice of trial is given for any sitting within term, two days before the day of sitting, and if for a sitting after term, before eight o'clock, P. M., of the day before the first day of such sittings. If the cause is not so entered for such sittings respectively, a *ne recipiatur* may be entered—that is, the defendant's attorney may give the associate notice not to enter the cause for trial. If the associate refuses to receive a record improperly, the plaintiff's attorney should mention the matter to the judge, who will order the cause to be entered, if it ought to be so.

Proceedings preparatory to the Trial.

Notice of trial having been given, the parties must respectively prepare

(v) *Whittaker v. Watson*, 6 Dowl. 429.

(w) *Blow v. Wyatt*, 4 M. & W. 467.

(x) There is a mode of trial, of which I have not deemed it desirable to take any particular notice, viz., the trial *at bar*; i. e., a trial by a jury in the Court at Westminster, and in presence of all the judges of the court. A trial of this kind may be had by the Crown as a matter of right, and by a party in any very important cases, on application to and by order of the court. A barrister, plaintiff or defendant, is said to have the privilege of a trial *at bar* if he demands it. This

their briefs and evidence. The brief contains an abstract of the pleadings in the cause, a statement of the case of the party on whose behalf it is given in full, the evidence by which that case is to be supported, and such suggestions as the *circumstances admit of, as to the nature of the case to be offered, or the evidence likely to be adduced in support of it, on behalf of the opposite party. [*269]

There is no proceeding in the course of an action of more importance to the party interested in it than the preparation of the brief. Numberless causes are lost because the counsel is not properly instructed; many are every day gained, when they ought not to be so, because the brief has been well got up, and the technical deficiencies of the opposite party's case taken advantage of. A treatise alone might be written on the preparation of the brief, but it forms no part of my subject; and, indeed, it is by experience alone, in most cases, that the attorney acquires the art of getting up the brief and evidence for the trial.

The evidence is, of course, either afforded by witnesses or by documents. (y) The attendance of witnesses is enforced by writ of subpoena, which is sued out of the court in which the action is brought, on a præcipe, entitled in the cause, and sealed at the office of the court, precisely as in a writ of summons. The præcipe is usually in this form,—

In the Queen's Bench:

A. B. } *Spa ad test:*

v. } or

C. D. } *Spa duces tecum.* Judge [or Sheriff]

H. J. S., *plaintiff's attorney.*

A copy of the subpoena must be served a reasonable time before trial on each witness, and his necessary expenses at the same time tendered to him. If the witness neglects to attend, the party who has subpoenaed him, may have his contempt of the court punished by an attachment; or he may bring an action against him for the injury, if any, he has sustained by his absence. The writ of subpoena issues to any part of England.

*It may so happen that a witness is abroad; if so, after issue joined, the party requiring the evidence must apply to the court [*270] or a judge for a commission to examine him; or if a witness residing within the jurisdiction is so ill as to be unable to attend and give evidence, he may be examined by a commissioner appointed by the court, or by a judge's order. In either case the evidence is taken by interrogatories or *vivâ voce*, as the case may be, and is read at the trial.

All depositions of witnesses taken under the order of a judge, rule of court, or writ of commission, must be returned to and filed in the office

mode of trial is very unusual, and for the practice relating to it I may therefore be permitted to refer to the cases of *Rowe v. Brenton* (8 B. & C. 737;) and *Dimes v. Cottenham* (1 L. M. & P. 318).

(y) The Law of Evidence has been much simplified by recent enactments, but there is as yet no elementary work on the subject to which I can refer the reader. Mr. Pitt Taylor's *Treatise*, or Starkie's *Law of Evidence*, are both standard works.

of the masters of the court, in which the action or proceeding is pending.⁽²⁾

A witness in prison is brought up, we have seen, by a writ of habeas corpus ad testificandum.

If either party intends to rely on documentary evidence, the documents, it is clear, must be either in his own possession, in that of his opponent, or in the hands of a third party. If the documents are in the hands of a third party, the attendance of that party with them is enforced by a writ of subpoena duces tecum.

If the documents are in the possession of the party himself, he must, of course, produce them, and, if necessary, prove them at the trial. To save the expense of such proof, he may call on his opponent to admit them, by "notice to admit."

Either party may call on the other by notice to admit any document, saving all just exceptions. The form of such a notice is prescribed by a rule of court.^(a)

If the party so called on refuses or neglects to admit, the costs of proving the documents at the trial, if they be so proved, must be borne by the party so neglecting or refusing (whatever the result of the trial may be,) unless at the trial the judge certify such refusal to have been [•271] reasonable; and in order to prevent a party from unnecessarily increasing the costs of proceedings, by proving documents at the trial itself, when they might have been admitted before trial, no costs of proving any document are allowed, unless a notice to admit has been given, except in cases where the omission to give the notice is, in the opinion of the master, who taxes the costs, a saving of expense (s. 117).

If the party admits the documents, he will sign an admission, and an affidavit of his signature by the attorney in the cause, or by his clerk will be sufficient evidence of such admission (s. 118).

The admission, if made, will of course be either generally of the documents mentioned in the notice, or of some one or more of them. If general, the admission may be indorsed or subscribed to the notice, as follows :—

I consent to make the admission required in the within note.

Dated this day of 18 .

*D. E. C., defendant's attorney [or plaintiff's
attorney, or agent, as the case may be]*

Or,

I consent to admit the documents marked numbers, 1, 2, 3, 4 in the within notice. Dated, &c.

If special, the admission may be on a separate paper, as follows :—

In the Queen's Bench.

Between $\left\{ \begin{array}{l} \text{A. B., plaintiff,} \\ \text{and} \\ \text{C. D., defendant,} \end{array} \right.$

(a) R. G. H. T. 1853, 33.

(c) *Ibid.*, 29.

I do hereby, as the attorney [or agent] for the above-mentioned defendant [or plaintiff, if it be so], agree to admit in evidence, on the trial of this cause, the paper writing hereunto annexed, marked A. [annex it], as and to be a true copy of [state of what, but more fully than in the notice]; and I do hereby also [if there be more than one document], as such attorney, agree to admit in evidence on such trial the paper writing hereunto annexed, and marked B. [annex it], as and to be a true copy of [state of what]. Dated this _____ day of _____, 18 ____.
D. E. C., plaintiff's [or defendant's]
attorney [or agent.]

*An admission by the attorney or agent in London will, in general, be proved at the trial, by calling the opposite attorney or agent as a witness. Admissions made in the country may be proved by an affidavit made before a commissioner for taking affidavits. It may be as follows:—

In the Queen's Bench :

Between { *A. B., plaintiff,*
and
C. D., defendant,

R. G., clerk to H. J. S., of _____, gentleman, attorney for the above-named plaintiff, maketh oath and saith, that D. E. C., of _____, gentleman, did on the _____ day of _____ instant [or last], duly sign the admission, hereunto annexed [annex it], in the presence of this deponent, and that the signature R. G. thereto is of the proper handwriting of this deponent.

Sworn, &c.

R. G.

If the documents are in the possession of his adversary, the party desiring their production may either serve him with a *subpoena duces tecum*, or give him "notice to produce" the documents at the trial. If he does not produce them, secondary evidence of their contents may then be given, which will be admitted on proof of the service of the notice to produce. The service of a notice to produce, the regular form of which may be obtained at any law stationer's, in respect of which notice to admit has been given, may also be proved by an affidavit of the attorney in the cause, or of his clerk (s. 119).

It may so happen that a document, not in the possession of the party himself, requires to be stamped before it can be admitted in evidence. In such a case the proper course is to apply to a judge at chambers for an order on the party in whose possession the document is, to produce it at the Stamp Office, for the purpose of being stamped. (b)

(b) Neale v. Sward, 2 Tyrw. 318.

The Jury.

The jurors for the trial of causes are summoned by the sheriff of the county in which the venue in the *action is laid, in virtue of a [*273] precept directed to him to that effect by the judges named in the commission of nisi prius (s. 105).

The qualifications of jurymen are regulated by the 6 Geo. IV. cap. 50, and it would be quite out of place to detail them here. It sometimes happens, however, that the plaintiff or defendant wishes the cause to be tried by a *special jury*, that is, by men of higher worldly rank, and greater wealth than common jurors. In such cases he must take certain further steps, which I shall endeavour shortly to describe.

If the venue in the action has been laid in London or Middlesex, the party wishing a special jury must obtain a *side-bar rule*, drawn up by the master on application for it, by which the court orders a special jury to be *struck*, as it is called, before the under-sheriff in Middlesex, or secondary in London, as the case may be. From the Jurors' Book, kept by the under-sheriff, or secondary, and which contains the "Special Jurors' List," the names of the parties qualified as special jurors are copied in alphabetical order, and numbered, and the numbers being copied on pieces of card, are put into a box, out of which the under-sheriff or secondary, as the case may be, draws forty-eight numbers, the names belonging to which are the special jurors to be summoned for the trial. As each number is drawn, the name is read aloud, on which either party may object to the juror, and if he proves him to be disqualified, the juror will be set aside—this process of drawing numbers continuing until forty-eight names are obtained. If the Special Jurors' List does not contain sufficient names, the remainder may be taken from the Jurors' Book generally, in the mode which was formerly pursued in nominating special jurors in counties of cities and towns corporate other than London. This latter mode of striking a special jury, may still, I ought to mention, if the parties wish it, be adopted. The sheriff, in this case, attends the master of the court with the "Special Jurors' List," and [*274] that officer having selected forty-eight names, the plaintiff and *defendant each strike off twelve, the remaining twenty-four constituting the special jurymen to be summoned for the trial.

If the venue in the action is laid in any other county, however, either party may have the cause tried by a special jury, with less trouble and expense than is necessarily incurred in striking a special jury in London or Middlesex; for the precept issued to the sheriff by the judge of assizes authorizes him to summon forty-eight special jurymen (s. 108), if he has had a notice from either party to the action to do so; for the cause need not be tried by a special jury unless the sheriff has had such a notice from one of the parties that the cause is to be so tried (s. 112).

In all cases the party requiring a special jury must give the sheriff a notice to that effect in London or Middlesex six days before the first day of the sittings; in the country six days before the commission day. The notice may be in this form :—

[For the Sittings in London.]

In the Queen's Bench :

Between { A. B., plaintiff,
and
C. D., defendant,

Take notice that this cause, in which a notice of trial has been given for the sittings within [or for the first day of the sittings after, or otherwise, as the case may be] this present term, to be holden at the Guildhall of the city of London, is to be tried by a special jury. Dated this day of 18 .

Yours, &c.

H. J. S., plaintiff's attorney.

To the Sheriffs of London.

Where notice is not given to the sheriff that the cause is to be tried by a special jury, and a special jury is not summoned or does not attend, the cause may be tried by a common jury, in like manner as if no proceedings had been had to try the cause by a special jury (s. 113).

In country causes the party requiring a special jury must not only give the sheriff notice, he must also give the opposite party notice of such his intention, *without which he will not be entitled to have the cause so tried (s. 109). This notice comes, in country causes, [*275] in place of the side-bar rule, and mode of striking the jury, which we have seen is now peculiar to London and Middlesex; but a special jury may still be *struck* in country causes, on either party showing cause there for, and obtaining a judge's order for the purpose (s. 108). If the plaintiff [in any action except replevin] desires a special jury, he must give ten days' notice to the defendant; if the defendant [or plaintiff in replevin] desires a special jury, he must give the other party seven days' notice of his intention (s. 109).

The notice may be in this form :—

In the Queen's Bench :

Between { A. B., plaintiff,
and
C. D., defendant.

Take notice, that it is the intention of the plaintiff [or defendant] to try this cause by a special jury. Dated this day of , 18 .

Yours, &c.,

H. J. S., plaintiff's [or defendant's] attorney.

*To Mr. D. E. C., defendant's
[or plaintiff's] attorney.*

A trial by a special jury is much more expensive than by a common jury, and the party obtaining it must pay the costs of it, even if he be successful. The judge may certify on the record, however, at the trial,

that the cause was a proper one to be tried by a special jury; and if so, the costs of it are costs in the cause.

Sometimes when the action relates to real property, it is desirable that the jury should have a view of the premises. If so, either party, on application, may obtain a rule, or an order, for a view, by six jurymen; and the sheriff, on request, will give the names of the six viewers, and also return their names to the associate, for the purpose of their being called as jurymen on the trial (s. 114). (c)

[*276]

*9. *The Trial.*

The causes entered for trial are set down in a list, and called by the associate as they appear in that list, each in his turn.

If a material witness be absent, or other good cause can be shown, a motion is sometimes made to put off the trial. This may be done at the instance of either party; but the condition usually imposed is the payment of the costs of the party, who is ready to go on. So, if a material witness be absent, it is sometimes necessary for the plaintiff to withdraw the record. In this case the defendant will be entitled to the "costs of the day," but not if he was not himself ready or willing to go on. (d) If a witness be absent, it is necessary to call him upon his subpoena, in order to be able to maintain an action against him for the damage sustained through his default.

If neither of these events should happen, the jurors are called over, empanelled, and sworn that they "shall well and truly try the issues joined between the parties, and a true verdict give according to the evidence." As they are called over either party may, in the case of a common jury, challenge the jurors. Challenges are very rare. They are of two kinds, either *to the array* or *to the polls*. Challenges to the array are exceptions to the entire panel or set of jurors returned by the sheriff, in consequence of some partiality imputed to that officer, who, we have seen, arrays the jury. Challenges to the polls are exceptions to individual jurors, and are of four kinds. 1. *Propter honoris respectum*, as if a peer of Parliament were empanelled; 2. *Propter defectum*, as if the juror challenged be an infant, lunatic, or not possessed of the necessary qualification; 3. *Propter affectum*, or for partiality, which is either *principal* or *to the favour*. A challenge is *principal* when the jury is related to either party, or has been interested in the cause, or for other reasons which need not be specially enumerated. A [*277] challenge *to the favour*, again, is grounded on some cause of suspicion, such as intimate acquaintance with the party. The validity of this challenge is determined by triors, who are two indifferent persons named orally by the court for this purpose, but who are superseded by the first two jurymen admitted, who then proceed to try the other challenges, if any. 4. *Propter delictum*, as when the juror is tainted by some crime which affects his credit.

If by default or challenges, twelve jurors of the panel cannot be em-

(c) *Stones v. Menheim*, 5 Ex. 382; R. G. H. T. 1853, 48, 59.

(d) *Pope v. Fleming*, 2 Ex. 249.

panelled, the court may orally command the sheriff to name a sufficient number of men duly qualified to make up the jury. Jurors who make default are liable to be fined.

Plea Puis Darrein Continuance.

Before I proceed, however, to describe the proceedings on the trial itself, I must diverge to the consideration of an unusual though often necessary plea, the mention of which has been reserved for this place, because it may be pleaded at any time before the verdict. It is called a plea puis darrein continuance; and is pleaded when some new ground of defence arises, of which the defendant has consequently had no opportunity of availing himself. It is thus named because anciently the proceedings in an action were continued from term to term, by the entry of a *continuance* on the roll.^(e) This plea was necessarily pleaded during one of these continuances, the whole term being in the eye of the law one day, and that the first day of the term. When this entry was omitted there was at once a *discontinuance*, by which the action was stopped. At the present day a plaintiff, we have seen, may at any time *discontinue*.

A plea puis darrein continuance must contain an allegation that the matter pleaded arose *after* the last pleading. Such plea may, when necessary, be pleaded at Nisi Prius, between the tenth of August *and twenty-fourth of October; but no such plea is allowed, [*278] unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, unless the court or a judge otherwise order (s. 69).

It may be pleaded at any time before verdict, even after the jury have retired to consider their verdict. It cannot be pleaded after a demurrer; the defendant must stand on the invalidity of the declaration; but it may be pleaded if any issue remains to be tried, although on other issues the plaintiff has already obtained judgment.^(f)

If pleaded at Nisi Prius, it must be delivered to the judge, not to the attorney of the opposite party,^(g) and it must then be certified on the back of the record, and returned to the court, when the plaintiff may reply or demur as in other cases. It cannot be replied to at Nisi Prius, for this plea at once stops the cause, and the pleadings must recommence as if the plea were pleaded directly to the declaration.

If the plaintiff replies or demurs to the plea, the defendant, if successful, will not be entitled to the costs incurred prior to the plea:^(h) but the plaintiff is at liberty to confess the plea, and is then entitled to the costs of the cause up to the time of pleading it.⁽ⁱ⁾

The plea must be pleaded within eight days after the matter of defence has arisen, unless the court or a judge otherwise orders. An order was

(e) This is no longer done. R. G. T. T. 1853, 31.

(f) Wagner v. Imbrie, 6 Ex. 380.

(g) See a curious plea of this nature in Toddy v. Emly, 1 Dowl. N. S. 598, in which case the judge dispensed with an affidavit.

(h) Littleton v. Cross, 4 B. & C. 117.

(i) R. G. T. T. 1853, 23.

**Proceedings on the Trial.*

[*280]

The whole proceedings on the trial are under the superintendence of the judge, who decides all points of law that incidentally arise, as to the admissibility of the evidence, and also informs the jury what is the legal effect of the evidence adduced. The general course of proceeding is for the plaintiff to state his case and prove it; (l) for the defendant to state his defence, and prove it, if necessary; for the judge to sum up the whole evidence: and for the jury thereupon to find their verdict. I shall suppose the trial to go through these several stages.

Amendment of the Record.

The plaintiffs (supposing there are several) in the course of their evidence may discover that there has been a nonjoinder or misjoinder of plaintiffs. Either of these errors may, we have seen, be amended by the judge upon such terms as he thinks proper. It may be necessary in some cases to stop the cause, and to give the defendant leave to plead *de novo*. So in an action on contract, it may appear that too many defendants have been sued, the effect of which, if not amended, would be to compel the plaintiff to abandon the action. This error may also be amended. The evidence adduced by the plaintiff may also show a legal contract, or cause of action varying somewhat from that stated in the declaration. If so, the declaration may be amended, and this must be done by the judge, so that the real question in controversy between the parties may be determined (s. 222). The terms on which these amendments are granted are generally the payment of the costs of the defendant, and also that he should be at liberty to plead *de novo*. In this case the trial of the action is at once stopped, and the jury discharged.

**Nonsuit.*

[*281]

The plaintiff, after he has adduced all his evidence, may think his case not sufficiently made out, or the judge may indicate an opinion, that there is no case to go to the jury. If so, the plaintiff, that he may not be barred from bringing a fresh action (which he would be, if there was a verdict against him,) will probably be nonsuited, that is, abandon his present action. He is then called in court, and, as a formality, he fails to appear. The effect of this default is a judgment of nonsuit, (m) which

(l) When the affirmative of the issue is on the defendant, he proceeds with his case first. Thus, if to an action on a bill it is pleaded, that the bill was procured by fraud, the defendant begins.

(m) This word is derived from the Norman-French *ne suit pas*. Anciently, the plaintiff was invariably called to hear the jury give their verdict, in order that, if adverse to him, he might be fined *pro falso clamore suo*. If he did not appear he was nonsuited, that is, adjudged to have deserted his suit, and judgment given against him. Hence the ceremony of *calling the plaintiff*, who cannot be nonsuited against his will.

entitles the defendant to his costs. A nonsuit may afterwards, however, be set aside by the court, and the parties go to trial again.

Demurrer to Evidence by Defendant.

If the plaintiff is content to leave his case to the jury on the evidence he has adduced, the defendant, if he thinks that evidence insufficient, may demur to the evidence, that is, while admitting all the facts adduced in evidence to be true, he may assert that the law arising therefrom is all in his own favour, and that he is consequently entitled to judgment. This is an unusual, if not obsolete, mode of proceeding,⁽ⁿ⁾ the effect of which is to have the whole facts proved submitted to the judgment of the court in banco; but there is another and more usual mode of doing this, viz., by a special verdict.

Reservation of a point of Law for the Court.

In the course of the case, either of the plaintiff or of the defendant, evidence may be offered, the admissibility of which may be objected to. The judge may either admit or reject the evidence offered, by ruling that, *in point of law, it is admissible or not. The party dissatisfied with the opinion of the judge has then two courses to adopt: he may either ask the judge to reserve the point, or tender a bill of exceptions to his ruling. The bill of exceptions I shall describe immediately. If the point is reserved by the judge, the effect is, that if the verdict be against the party unsuccessfully tendering, or unsuccessfully objecting to the evidence, he may apply to the court for a new trial, on the ground of the improper rejection or improper reception of evidence, as the fact may have been. It is therefore usual to make another kind of reservation; viz. :—

Reservation of leave to move to enter a Nonsuit or a Verdict.

For sometimes, on the admissibility or rejection of some part of the evidence, or on the soundness of the ruling of the judge in point of law, may depend the whole case. If so, it is usual to accompany the reservation of the point by the judge at the trial, with a leave to the party who has raised it to move the court for that judgment, which ought to be the judgment of the court, if the point raised at the trial had been there properly decided. If this leave is reserved to the defendant, it is generally to move to enter a nonsuit; if it is reserved to the plaintiff, when the defendant is successful, it is generally to move to enter a verdict.

(n) Gibson v. Hunter, 2 H. Bl. 209.

Bill of Exceptions.

If, however, the judge declines to reserve the point, or if the party against whom he has ruled wishes to take the opinion of a Court of Error, (for at present, upon a motion by leave reserved to enter a nonsuit or a verdict, the decision of the court in banco is final,)(o) he may tender a bill of exceptions to the ruling of the judge. This is usually done by the counsel asking the judge to take a note of the exceptions, [*283] *which must be afterwards drawn up in formal shape, and then forms the bill of exceptions, which the judge must seal, and return tacked to the record in the action, of which it then becomes a part.(p) The party excepting must then bring error in the Court of Exchequer Chamber, when his exceptions will be considered, and such judgment awarded as the justice of the case requires. Thus a new trial may be ordered,(q) if the ruling of the judge at the trial was wrong, and that ruling affected the verdict. The party dissatisfied with this judgment may bring error on it in the House of Lords, where judgment is final.

The Defendant's Case.

The plaintiff having concluded his case, the defendant's counsel proceeds to state the case for the defendant, and to adduce evidence in support of it before the jury. If the evidence adduced by him show facts differing slightly from those alleged in the plea or pleas, these may be amended by the judge in the same way, and subject to the same conditions or amendments made at the instance of the plaintiff (s. 222). The plaintiff again replies, and adduces fresh evidence, if necessary, to contradict that offered by the defendant.

I have pointed out the modes in which the cause may be put an end to while the plaintiff is proving his case. The cause may be stopped in other ways, by the consent of both parties, either by the withdrawal of a juror or by a reference to arbitration.

Withdrawal of a Juror.

The withdrawal of a juror generally takes place when neither party feels sufficiently confident of success to induce him to persevere. The effect of it is, that the jury is at once made incomplete—there can be no verdict, and each party pays his own costs. An agreement of this kind is enforced by the court, *which will, if necessary, and in the exercise of its equitable jurisdiction, stay any further proceedings in the cause, on the ground of their being contrary to good faith.(r) [*284]

(o) The Common Law Commissioners (2nd Report) recommend an alteration in this rule.

(p) Money v. Leach, 3 Burr. 1742.

(q) R. G. T. T. 1853, 24.

(r) Moscati v. Lawson, 4 A. & E. 331.

Reference to Arbitration.

A reference of the cause to arbitration usually takes place when the questions between the parties arise from complicated accounts, which it would be difficult to explain to a jury, or, where there are conflicting claims, which require decision, before a final arrangement can be effected, or litigation ended.

When a cause is referred, an order of *Nisi Prius* is drawn up, which authorizes the arbitrator to direct the verdict to be entered for the party who ought, in his opinion, to have such verdict, and for such sum as he may decide to be due to him. This order may be made a rule of court; performance of the award may be compelled by an application to the court, for leave to enter up judgment in pursuance of it. On this judgment, execution issues as in ordinary cases. The award may be, in certain cases,^(s) set aside; or, when necessary, enforced by action at law or suit in equity. But this tribunal is, in practice, one of a most unsatisfactory, and at the same time, most expensive nature, and which ought never to be resorted to, if it can be avoided.

Discharge of the Jury.

The cause may also be put an end to, by the judge discharging the jury from finding a verdict. Thus, if a jurymen become suddenly ill, or the jury, after a certain time spent in deliberation, cannot agree upon their verdict (for they must be unanimous in opinion,) it is usual for the judge to discharge them. In the case of the jury being merely unable to agree, the judge has the power, if he thinks fit, to carry the whole jury with him in a cart round the circuit, but this is a course never [•285] resorted *to. When the jury is discharged, no costs of the trial are allowed to either party.^(t)

The Summing up.

After the parties have closed their cases, the judge sums up the evidence to the jury, and informs them what is the law arising upon the facts proved. If he misdirect them in point of law, this may afford ground afterwards for an application to the court in banco, for a new trial; or the party who thinks the direction to be erroneous and injurious to his case, may tender a bill of exceptions in the manner I have already described. A bill of exceptions must always be tendered before the jury give their verdict, for after the verdict it is too late to do so.

(s) Ante, p. 7.

(t) *Bostock v. North Staffordshire Railway Company*, 21 L. J. R. 384, Q. B. The jury at present are allowed neither meat, drink, nor fire after being charged, until they find a verdict. But this somewhat extraordinary mode of arriving at the truth, by the exhaustion of the physical powers of the jurymen, is about to be altered (Common Law Commissioners, 2nd Report,) unless indeed the legislature refuse to adopt the suggestions of the Common Law Commissioners.

10. *The Verdict.*

The verdict of the jury is taken by the associate, an officer expressly associated with, and appointed to assist the judge at Nisi Prius, who makes a minute of it on the back of the record.

From this minute, the *postea*, a formal statement of the proceedings at the trial, is afterwards drawn up and added to the Nisi Prius record. The "*postea*" is so called, because the recital of what has taken place at Nisi Prius, when the records were kept in Latin, began with this word. It now begins "*Afterwards*," and states, in technical language, the result of the trial, in a form prescribed by the rules of court, and which, in the case of a verdict for the plaintiff in Westminster, is to this effect:—

*Afterwards, on the day of , A. D. , [the first day of the sittings] at Westminster Hall, in the county of Middlesex, before the Right Honourable John Lord Campbell, *Her Majesty's Chief Justice assigned to hold pleas in the court of our Lady the Queen [*286] before the Queen herself, come the parties within mentioned by their respective attorneys within mentioned, and a jury of the within county being summoned, also come, who, being sworn to try the matters in question between the said parties upon their oath, say that, [etc., here the affirmative or negative of the issue is stated, as it is found for the plaintiff, and in the terms adopted in the pleading.] And they assess the damages of the plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, to £ , and for those costs to 40s. Therefore, etc.*

The verdict may be either general or special. Thus, in an action of debt, where the jury find "for the plaintiff, debt 50*l.*" this is a general verdict. But the distinction between this and a special verdict arises more properly in different circumstances. Thus, supposing a question of law to become the real matter in dispute between the parties, i. e., that the question comes to be, whether on the facts the law is for the plaintiff or for the defendant, and that the parties wish to have the judgment of the court on the *law*, they ought, in this case, to take the opinion of the jury *solely* on the *facts*, which may be done in one of two ways. The jury may find for either party generally, subject to the opinion of the court in banco on a special case,—or they may find a special verdict.

In the first case the jury are said to find a *general* verdict. It is entered on the record as a general verdict, for the plaintiff, or for the defendant, as the judge may have directed, or the parties may have agreed at the trial that it should be. It does not appear on what evidence it was found, and error cannot be brought on the judgment of the court by the unsuccessful party, for *ex facie* of the record, the judgment is unimpeachable. The special case ought to be dictated by the judge, and signed by the counsel on each side, before the jury are discharged. The jury must also consent to it, for it is their statement of the *facts* of the

case, and they are always at liberty to find their verdict absolutely, if they think fit, either for the plaintiff or defendant.

[*287] *If either of the parties wish to have an opportunity of going to a Court of Error, then a *Special Verdict* ought to be taken, if the jury will consent to give it. In this case, the jury state all the facts as they find them proved, and add, "that they are ignorant in point of law on which side they ought upon these facts to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at £ ; but if the court are of an opposite opinion, then vice versa."

In the case of a special verdict, all the facts appear on record, just as they would have done had the defendant demurred to the evidence. The facts on which the judgment of the court rests, appear on the face of the judgment roll, and the judgment itself may therefore be impeached in a Court of Error, if the court below has not come to a correct conclusion.

The Special Case, where there is a general verdict, is set down in the special paper, copies of it are delivered to the judges, notice is given to the other party, and the case argued precisely as a demurrer. The verdict stands, or is altered according to the judgment of the court, which is *final*.

The effect of the facts, in point of law, stated in the Special Verdict, is argued in the same way, and judgment entered accordingly; but on this judgment, the unsuccessful party may bring error; the right of doing so, it will be observed, thus constituting the real difference between a general verdict, subject to a special case, and a special verdict.(u)

11. Applications to the Judge after the Verdict.

After the verdict has been given, it is sometimes necessary to apply to the judge for a certificate to entitle the successful party to costs.

[*288] *I have already mentioned the statute 3 and 4 Vict., c. 25.(v) In any action of trespass for words, or assault or battery, or the like, if the plaintiff recovers less than 40s., he is not entitled to costs. But if the trespass was to real property, and the action was brought to try a right, the judge may certify that it was so, so as to entitle the plaintiff to his costs of suit. In actions on judgments, we have seen(w) that the plaintiff will not recover costs unless the judge certifies for them. So, by the statutes establishing the new County Courts, if a plaintiff in certain cases recovers *less than twenty pounds* in an action of contract, or five pounds in an action of tort, he will not recover his costs, as in such a case he ought to have sued in the County Court; while, if he recovers less than *fifty pounds* in an action of contract, in which the venue is *London*, he must have a certificate to entitle him to his costs.(x)

(u) This distinction the Common Law Commissioners have recommended should be done away with, by the legislature enabling the unsuccessful party to bring error on the judgment given on a special case.

(v) Ante, p. 89.

(w) Ante, p. 122.

(x) 15 and 16 Vict. c. lxxvii. The London (City) Small Debt Extension Act,

When the cause has been tried by a special jury, the party who has obtained it must apply to a judge to certify that the cause was a proper one to be tried by a special jury, otherwise he will not obtain the costs of it.

Another application which may be necessary is for *speedy execution*. Execution issues in fourteen days after the verdict, but it may issue at an earlier period if the judge so order it; as he may do, if satisfied, for instance, that the defendant is about to abscond or to sell off his effects, or that the defence was merely to gain time.

If the party, against whom the verdict is given in an action which has been tried in vacation, which it must be if tried at the assizes, has tendered a bill of exceptions, or intends to move for a new trial or in arrest of judgment, he should apply to the judge to stay execution, until he can move the court in the following term.

*So if one party has refused to admit documents which have been proved at the trial, and has thereby rendered himself liable [*289] for the costs of such proof, unless his refusal to admit was reasonable, he should apply to the judge to certify that such refusal on his part was reasonable.

A justice (or constable) is, by stat. 7 Jac. I., c. 5, entitled to double costs, if successful in an action brought against him, for anything done in the execution of his office. To entitle him to these costs, the judge must certify that he was acting in the execution of his office. The protection thus afforded to justices is, by stat. 21 Jack. I., c. 8, extended to overseers and churchwardens. To entitle them to double costs the certificate of the judge is also requisite. By 5 and 7 Vict., c. 97, *full costs* only are now to be allowed.

12. *Proceedings after the Verdict.*

The proceedings on the trial terminate with the verdict, which, we have seen, ought to be drawn up in the technical form of the *postea*, and added to the *Nisi Prius* Record. That record ought then to be returned to the court in which the action is pending, that the court, on seeing how the issues have been found by the jury, may give judgment accordingly. In practice, however, the party entitled to judgment, merely attends at the office and signs judgment on the *postea*, at the expiration of the period at which he is allowed to do so. This is now in all cases on the expiration of fourteen days(y) after the verdict; and I now proceed to describe the proceedings by which that verdict may be rendered of no avail.

Judgment then follows out the verdict of the jury [except in the case of a special verdict, or a general verdict, subject to a special case, and then only after argument, as I have already stated], as a matter of course, unless there be—

1852. Observations have been made on various enactments in this Statute, which differ from those in the other County Court Acts, far from complimentary to the law officers of the Corporation of London.

(y) Com. Law Proc. Act, 1852, s. 120. R. G. H. T. 1853, 57.

MARCH, 1854.—14

1. An arrest of judgment.
2. Judgment non obstante verdicto.
3. *An award of a repleader.
- [*290] 4. An award of a venire de novo.
5. Entry of a nonsuit, pursuant to leave reserved, where there has been a verdict.
6. Entry of a verdict, pursuant to leave reserved, where there has been a nonsuit.

Lastly. A rule for a new trial; which, however, I shall treat of in a separate section.

Arrest of Judgment.

If the verdict is for plaintiff, the defendant may move in *arrest of judgment*, that is, that the judgment be stayed or arrested, on the ground of some error appearing on the record.

Every person who sues another must state a good cause of action, and every defendant who pleads to an action must state a sufficient defence. Every suitor ought obviously, therefore, to be entitled to question two things—the truth of the statement of his adversary in point of fact, and its sufficiency in point of law. No suitor should be compelled to admit the legal sufficiency of a claim, nor yet its truth, when he contends that neither exists. Formerly, as I have pointed out, he could deny both; but he did so under this disadvantage, that he could not, as a right, first test the sufficiency of the claim or defence in point of law, and then contest the truth of the facts. If he demurred he could not afterwards insist, as of right, that the truth of the facts should be tried, if the judgment on the law were against him. He might, however, deny the truth of his adversary's statement; and should its truth be established, he might thereafter, if he was defendant, by motion in arrest of judgment, —or, if he was the plaintiff, by motion for judgment non obstante verdicto,—or if unsuccessful in the action, whether plaintiff or defendant, by bringing error,—question its legal sufficiency as a claim or defence, as the case might be. Apparently such a right seems reasonable, but

[*291] mischievous consequences frequently followed from it. Thus, if through inadvertence a party omitted a *material averment in a declaration (as, in an action against the drawer of a bill, the averment of notice of dishonour), the defendant, observing the omission, might keep his objection secret, and *plead over*, as it is called, traversing the other averments of the declaration. The cause was then tried, and a verdict found for the plaintiff, when the defendant took his objection, by motion in arrest of judgment; an objection which was fatal, no amendment being allowed after trial. If the defect had been pointed out before the trial, the omitted fact, if capable of proof, might have been supplied by amending the declaration; if it were not capable of proof, the costs of the trial, at all events, might have been saved.

It is a fundamental principle of the law, that the statement of facts on the record shall show a good cause of action, or a good ground of defence. Thus if the action be for calling the plaintiff an *adulterer*, the judgment

will be arrested after verdict for the plaintiff, as his declaration shows no good cause of action.^(z) But in cases in which the motion in arrest of judgment by a defendant, or for judgment non ob. ver. by the plaintiff, is founded on the non-averment of some alleged material fact or facts, or material allegation, or other cause, in the declaration or plea, as the case may be, the party whose pleading is alleged or adjudged to be defective, may, by leave of the court, suggest the omitted fact or facts or other matter, which, if true, would remedy the alleged defect; and such suggestion may be pleaded to and tried as an ordinary issue (s. 143). If the facts suggested be admitted or found to be true, the party suggesting will have such judgment, as he would have been entitled to, if the omitted fact or facts had been originally stated, together with the costs of, and occasioned by the suggestion; if they be not found to be true, the judgment will be arrested, and the opposite party will be entitled to the costs of the suggestion (s. 144). But upon an arrest of the judgment, or a judgment non obstante veredicto, the costs of *issues found for the unsuccessful party are to be adjudged to him (s. [*292] 145).

Thus if a motion in arrest of judgment is made in an action against the indorser of a bill, on the ground that there is no averment in the declaration that he had notice of the dishonour, this omitted averment may be suggested on the record as a matter of fact, pleaded to, and tried as an ordinary issue (s. 143). If found to be true, the judgment will stand, and costs be given to the successful party (s. 144). If the suggestion is negatived, the judgment will be arrested, but the plaintiff will, notwithstanding, be entitled to the costs of the trial of the issues of fact arising out of the pleadings, for defect of which the judgment has been arrested (s. 145).

Judgment non obstante veredicto.

If the verdict is for the defendant, the plaintiff may move for judgment non obstante veredicto, that is, that judgment be given in his favour, without regard to the verdict. This motion may be made when the plea of the defendant is bad in law, and when, of course, its being true in point of fact is of no consequence whatever. The judgment for the plaintiff, in this case, is on the *confession* of the defendant, for judgment non obstante veredicto can only be given, when the plea is in confession and avoidance. This judgment is always granted on the merits, and never granted but in a very clear case, where it is apparent that in any way of putting the case the defendant can have no merits.^(a) A bad plea in confession and avoidance is evidently no plea at all.

If the plea is bad merely in consequence of the omission of an averment of some material fact, this may form the subject of suggestion and trial, as in the case of a motion in arrest of judgment. Upon the truth of the suggestion being found by the jury the judgment stands: on its

(z) *Ayre v. Craven*, 2 Ad. & El. 2.

(a) *Adams v. Jones*, 12 Ad. & El. 459.

[*293] being negatived, the court gives judgment for the plaintiff; but the costs of *the issues of fact will still be given to the defendant (ss. 143, 144, 145).

Repleader.

The motion in arrest of judgment, or for judgment non obstante veredicto, are each founded on defects apparent on the case on the record; the former when the plaintiff is in fault, the latter when the defendant has failed to make a good defence. Another defect may appear on the record, viz., that the pleadings have miscarried, or failed to effect their proper object, which is to raise *material* issues, that is, issues on which may be decided the real questions in dispute. If this defect appears at the trial, the pleadings may then and there be amended (s. 222). If it does not appear at the trial, either party may afterwards move for a repleader, that is, that the pleading may be begun afresh at that part which first miscarried. A repleader cannot be awarded except in cases where complete justice cannot otherwise be done between the parties; and in no case will it be awarded in favour of the party who first miscarried in his pleading. It may be awarded by the Court of Error,^(b) should the party instead of moving for it in the court below, as he ought to do, bring error on the judgment. As both parties have been in the wrong, in cases when a repleader is necessary, neither is entitled to costs.^(c)

Venire de novo.

A venire de novo, i. e., a new order to the sheriff to summon a jury to try the issues, is so termed because the jury, who are now, as we have [*294] seen, *summoned in virtue of a precept issued to the sheriff by the judge of nisi prius, were formerly summoned in virtue of a writ called a venire facias juratores. A new venire was awarded when, owing to some irregularity or defect in the proceedings, the proper effect of the first venire had been frustrated. Thus, if a challenge had been wrongly disallowed, the jury was incomplete, and the verdict consequently a nullity. So if the jury had been improperly chosen; so if the verdict given had been uncertain or ambiguous. When the unsuccessful party objects to the verdict on technical grounds (rather than on the merits,) he may apply for a venire de novo, on awarding which the court can neither impose any condition on the party entitled to it, nor any terms as to costs.^(d)

(b) R. G. T. T. 1813, 24.

(c) Plummer v. Lee, 2 M. & W. 495. Whether the plaintiff can have judgment non obstante veredicto, or whether there must be a repleader, depends on the fact, whether the plea does or does not contain a confession of a cause of action. If a cause of action is confessed by the plea, and the matter pleaded in avoidance is insufficient, the plaintiff is entitled to judgment non obstante veredicto; but if the plea does not confess a cause of action, there must be a repleader (2 Wms. Saund. 319.)

(d) Witham v. Lewis, 1 Wils. 48; Edwards v. Burn, 1 Tyrw. 281. I have used the term venire de novo, although this process is abolished. It might, perhaps, have been more correct to speak of a new jury process. In cases where a venire

Entry of Nonsuit pursuant to leave reserved.

The court may be moved to *enter* a nonsuit instead of the verdict given by the jury, if the judge who tried the cause reserve leave for the defendant, at the trial, to make such an application. If a point is raised at *nisi prius*, on which the party wishes to take the opinion of the court in *banc*, but does not wish to go to a court of error, it may, by the presiding judge, be reserved for the consideration of the court. The case on this reserved point is set down and argued as if it were a demurrer. If the judge at the trial ought to have nonsuited the plaintiff, the court will order a judgment of nonsuit to be entered.

Entry of a Verdict pursuant to leave reserved.

So, if the legal effect of the point reserved at the trial is such, that a verdict should have been given by the jury for the defendant, such verdict will now be entered. But unless at the trial leave has been [*295] reserved to the plaintiff to move to enter a verdict, the court in *banc* has no authority whatever to entertain any motion made for it: in such a case the plaintiff can only move for a new trial. The decision of the court, either in entering a verdict or a nonsuit is *final*.(e)

13. *Motion for a New Trial.*

Whenever it can be made to appear to the court, that justice requires that a new trial should be had, the court will award it.(f) The court will not, however, grant a new trial when the sum in dispute does not exceed 20*l.*, unless it can be clearly shown that the judge misdirected the jury, or improperly received or rejected material evidence. But when this can be shown, a new trial is granted as of right, and without imposing the payment of costs on the party seeking it, a condition on which only (in ordinary cases) can a rule for a new trial be obtained.

A new trial ought to be applied for, before the same party moves in arrest of judgment, because the latter proceeding admits that there is no ground to object to the verdict on the merits. Successive new trials may be granted, but the court exercises this power cautiously and reluctantly, and only grants a new trial a second time when it is essential to the ends of justice.

A new trial, then, may be applied for—

1. If the judge improperly received or rejected evidence; or misdirected the jury as to the law; or improperly discharged the jury; or

de novo would formerly have been granted, a new trial simply may now be granted without costs.

(e) The Common Law Commissioners (2nd Report, 1853) recommend that the decision of the court in either case should be subject to appeal in a Court of Error.

(f) *Bright v. Eynon*, 1 Burr. 393.

refused to amend the record when an amendment ought to have been made.

2. If the defendant did not receive due notice of trial.
3. If the successful party misbehaved.
- [*296] *4. If there was any misbehaviour in the jury.
5. If the verdict was unreasonable.
6. If the party, against whom the verdict was given, was taken by surprise.
7. If the witnesses swore falsely.

8. If new and material facts have come to light since the trial.

1. The judge is to decide all points that arise at the trial, as to the admissibility of evidence offered, and to inform the jury what is the legal effect of that evidence, when given. If the judge admit or reject evidence improperly, the party objecting to its admission in the first case, or offering it in the other case, may tender a bill of exceptions, or ask the judge to take a note of the objection, and reserve the point for the court. Where a bill of exceptions is tendered, error must be brought to give effect to the objection. Where the point is reserved for the court, the judgment of the court on the point reserved is final at present, but will, in all probability, ere long be open to appeal to a Court of Error. If the judge erroneously direct the jury, the party whose case or defence is thereby prejudiced may tender a bill of exceptions. Whether the party has tendered a bill of exceptions or not, he may afterwards move for a new trial, on any of the grounds on which he has excepted; but if he has tendered a bill of exceptions, it must be abandoned before a motion for a new trial will be entertained. For the court will not allow a party to move for a new trial, and when this is refused, to fall back on the bill of exceptions. If the judge makes an amendment at the trial when he ought not to have done so, the party thereby prejudiced may move for a new trial. But if the judge refuses to amend, his decision is conclusive, and the court will not entertain an application to review it.(g)

2. If the defendant has not received due notice of trial, and does not by any proceeding waive his *right of objection, the court will [*297] set aside the verdict and grant a new trial.(h)

3. A new trial will be granted if the successful party has been guilty of a breach of good faith, as where he refuses to admit in evidence at the trial documents which he had previously agreed to admit:(i) A new trial was granted where the successful party had, in a way calculated to affect the verdict, circulated handbills reflecting on the character of the other party, which were shown to the jury.(k)

4. A new trial will also be granted if the jury has misbehaved, as by casting lots, and giving the verdict accordingly.(l)

(g) *Doe v. Errington*, 1 M. & R. 344. (h) *Williams v. Williams*, 2 Dowl. 350.

(i) *Doe v. Roe*, 5 Dowl. 420; see *Anderson v. George*, 1 Burr. 152.

(k) *Coster v. Merest*, 3 B. & B. 272.

(l) *Ramage v. Ryan*, 9 Bing. 333.

5. If the verdict is palpably unreasonable, a new trial will be granted. Thus a new trial will be granted on the ground that *damages are excessive*,^(m) though in certain actions, such as actions for crim. con., seduction, slander, or personal injuries generally, the court will rarely, and except in a very strong case, interfere with the opinion of the jury. So if the verdict has been *against the weight of the evidence*, a new trial will be granted, the court being in this case always much influenced by the opinion of the judge who tried the cause. If he expresses dissatisfaction with the verdict, a new trial will be granted; but if the judge reports that the evidence was nearly balanced, so that the effect of it was for the jury, the court will not interfere. If there was *no evidence* to have justified the jury in arriving at the conclusion, at which they did arrive, the court will always grant a new trial; and so, if the verdict was *perverse*, that is, directly contrary to *the opinion of the* [*298] judge, the court will grant a new trial, but without costs.⁽ⁿ⁾

6. Where a verdict has been obtained *by surprise*, a new trial will be granted. What will constitute surprise depends on the circumstances of each particular case.^(o)

7. Where the witnesses for the party in whose favour the verdict has been given, can be clearly shown to have sworn falsely, a new trial will be granted.^(p)

8. If new and material facts have come to light since the trial, of which the party was ignorant at the time, and which, consequently, could not be laid before the jury, a new trial will be granted.^(q)

The motion for a new trial must be made within four days after the trial, if the cause was tried during term. If the cause was tried out of term, it must be made within the first four days of the next term. In the meantime, to stay execution on the verdict, an order of the judge trying the cause, or of any other judge at chambers, ought to be obtained (s. 120). Except in a very clear case, indeed, execution will not be stayed, except on security being given for the debt and costs, or the amount thereof being brought into court.

The motion is made by counsel, and is founded either on the judge's notes of what took place at the trial, as in the case of the ground for the application being a misdirection of the judge, or that the verdict was perverse, or against the weight of the evidence; or on affidavits of other facts, which can only thus be brought before the court, as that new and material evidence has come to light, or that the verdict was obtained by surprise. The rule, if **granted*, is a rule nisi, against which the [*299] other party shows cause, on one of those days in term set apart for taking the "*New Trial Paper*," or list of the causes in which rules

(m) Day v. Edwards, 1 Taunt. 491.

(n) Harrison v. Fane, 1 Scott, N. R. 287.

(o) Todd v. Emly, 2 Dowl. N. S. 570.

(q) Broadhead v. Marshall, 2 W. Bl. 955.

(p) Fabrilus v. Cock, 3 Burr. 1771.

to show cause have been granted. On cause being shown, the rule is made absolute, with or without costs, or on the condition of the party applying for the new trial paying the costs of the former trial, as the court in its discretion may think fit. If discharged, the rule is almost invariably discharged with costs.

The decision of the court in granting or refusing a new trial is final.^(r)

Except on the grounds above referred to, a new trial cannot be obtained, for it is one of the great principles of the law of England that the decision of a jury upon a question of fact is irreversible and conclusive.

The verdict of the jury for the plaintiff may thus be rendered nugatory by an arrest of judgment; or a finding for the defendant be made of no avail, by the court giving judgment for the plaintiff *non obstante veredicto*.

Should a repleader be awarded, the parties recommence their pleadings as if nothing had been done; if a new jury process is ordered, the record goes down for trial before a jury properly summoned to try it.

The entering of a judgment of nonsuit, or of a verdict pursuant to leave reserved, are final judgments. If a new trial is ordered, the cause again goes down for trial, as if the issues had not been tried at all.

[*300]

*CHAPTER X.

JUDGMENT.

THE verdict of the jury is, in ordinary cases, followed by the judgment of the court, which is also usually the last proceeding in an action, and is always supposed to be given upon the matter brought before the court by the record. I have had occasion in various parts of this treatise to mention several of the usual judgments of the courts. But these, I may now state, are not (except in the case of judgments on a special case, special verdict or demurrer, and of the judgments in Courts of Error) given by the mouths of the judges; they are merely *signed* by the party entitled to them, in the way I have previously pointed out.

Judgments are either for the plaintiff—

1. On default of appearance by the defendant to the writ; or,
2. On the defendant's confession by *nil dicit*; as when he fails to plead a proper time.

Or, for the defendant, on

1. *Non. pros.*, i. e., when the plaintiff fails to declare, rejoin, or take any other step within the time allowed him to do so:

^(r) The Common Law Commissioners have recommended (2nd Report, 1853,) that this decision should be open to an appeal to a Court of Error by the party aggrieved.

2. Nolle prosequi; as in the case of the plaintiff being satisfied with the amount paid into court by the defendant:

8. Retraxit, which I have not yet had an opportunity of mentioning, and which is where the plaintiff on his own accord declines to follow up his action. The difference between this judgment and that on a nolle prosequi, is, that a retraxit is a bar to any future action for the same cause; whereas a nolle prosequi is not, unless made after judgment. (1 Wms. Saund. 207 n.) Hence a retraxit is rarely entered. A recent instance of a retraxit entered *by a defendant, may be seen in the case of Herbert v. Sayer (2 D. & L. 65, n.) [*301]

4. Discontinuance; the nature of which has been already described; or,

5. Nonsuit; which has also been explained to be the judgment signed against a plaintiff who fails on the trial of the cause.

Or, for either party, on

1. Demurrer;
2. Issue of nul tiel record; or
8. Verdict.

Judgments are either *interlocutory* or *final*. The former do not terminate the action. Thus, as I have formerly stated, where damages are sued for, the defendant by allowing judgment to go against him by default, admits some damages to be due, and the court awards them to the plaintiff by its judgment. But it cannot award the exact amount until it is ascertained, which being done, *final* judgment is given for that amount. So where judgment is given against the defendant on a demurrer, the judgment is interlocutory; viz., that the plaintiff do recover his damages. I have formerly pointed out, that to ascertain the amount of these damages, a writ of inquiry is issued to the sheriff, on the return of which, with the verdict indorsed, final judgment for the amount given by the verdict is signed. I have shown how, in order to save time, notice of inquiry may be indorsed by the plaintiff on a joinder in demurrer, and I have explained in what cases the amount, for which final judgment is to be signed, will be ascertained by the master, instead of on a writ of inquiry. It would encroach too much on my space, and on the patience of the reader, were I to give a form of these several judgments. I therefore confine myself to giving the form of a judgment for the plaintiff, on a verdict in a town cause, which is as follows:—

Afterwards, on the day of in the year of our Lord
*, [day of signing final judgment] come the *parties afore-* [*302]
said, by their respective attorneys aforesaid [or as the case may
be, if they have not appeared by attorneys], and the Right Honourable
John Lord Campbell, Her Majesty's Chief Justice assigned to hold Pleas
in the court of our Lady the Queen before the Queen herself, hath sent
hiher his record had before him in these words: Afterwards, [here is
copied the Postea at length] Therefore it is considered that the plaintiff
do recover against the defendant the said moneys by the jurors aforesaid in

form aforesaid assessed [if the action was in debt, and the jury did not assess the debt, but only the damages and forty shillings costs, then it would be "*do recover against the defendant the said debt of £ , and the moneys by the jurors aforesaid in form aforesaid assessed*"; and also £ for his costs of suit by the court here adjudged of increase to the plaintiff, which said moneys and costs [or "*debt, damages, and costs,*"] in the whole amount to £ .

[In the margin of the roll, opposite the words "*Therefore it is considered,*" is written "*Judgment signed the day of , A. D., 18 ,*" stating the day of signing the judgment.]

As a judgment is the act of the court, judgment formerly could have been given only in term, at which time all writs of inquiry were accordingly made returnable. To prevent the delay often thus occasioned, the stat. 1 Will. IV., c. 7, enacted, that writs of inquiry might be made returnable on any day in term or vacation. Accordingly, as we have seen, at the return thereof, judgment may be signed, costs taxed, and execution issued.

So judgment, after a verdict, could formerly be obtained only in term. A remedy for any delay that might be thus occasioned was provided also by the stat. 1 Will. IV., c. 7, which enables the judge before whom the cause is tried to certify for immediate execution. But a certificate of this kind will rarely be necessary, in the present day; for now, in all cases, judgment may be signed and execution issued in fourteen days after the verdict.

Notwithstanding any judgment signed or execution issued, the court may afterwards order the judgment to be vacated and execution stayed, [*303] and may enter an arrest of judgment or grant a new trial. *If this is done, a writ of restitution will be issued to restore the party injured to all he has lost.

The judgment is not usually entered upon any roll. Indeed the only record usually made up in an action is the *Nisi Prius* record, to which the *postea* must be added after the verdict has been given; for which purpose the record must be got from the associate. The *postea* being added, the record is taken to the master's office, where judgment may be signed on the *postea*. This signing judgment, as I have already explained, is merely obtaining the signature of the master to the *incipitur*, a document stating only the first words of the declaration, on the margin of which is stated the amount of the sum awarded to the successful party, in the shape of the debt awarded by the jury, and the costs of the action as taxed by the master. Previous to taxing costs, one day's notice of taxation must be given to the opposite party, that he may attend and see that more costs are not allowed, than have been properly incurred. This signature of the master to the *incipitur* is an acknowledgment by the court through their officer, that the party is legally entitled to judgment, which he may afterwards enter on the judgment roll in proper form whenever he thinks fit; for it is not necessary, before issuing execution, to enter the proceedings upon the judgment roll, but on the inci-

pitur thereof judgment may be signed, costs taxed, and execution issued (s. 206). If it is necessary to produce the proceedings in the cause in evidence, the judgment roll, or an examined copy, is the only evidence that will be received. In such a case the proceedings must be entered upon a parchment roll, and deposited in the treasury of the court. In taxing costs, the costs of making up the judgment roll are always allowed, though not in one case in thirty, perhaps, is the roll made up and deposited in the office of the court.

Formerly judgments were only signed in term, and as term is considered as one day, every judgment *had relation back to the first day of the term in which it purported to be signed. All judgments must now be entered of record of the day of the month and year when signed, whether in term or vacation, and have no relation to any other day, though in certain cases judgment may by order of the court be entered *nunc pro tunc*.^(a) [*304]

The effect of a judgment is to bind all lands, tenements, and hereditaments, of which the party against whom it is obtained, or any trustee for him, is possessed at the time. In order to affect with notice purchasers, mortgagees, and creditors, it must be registered in the Court of Common Pleas, and the registration renewed every five years. (3 and 4 Vict. c. 11, s. 5).

By 1 and 2 Vict. c. 110, s. 13, judgments are also made an equitable charge upon all the estate, over which the debtor can exercise any control.

Costs.

Incident to, and, indeed, a part, and often the most important part of the judgment, is the award of the costs of the action to the successful party. These are either *interlocutory* or *final*. Interlocutory costs are given upon applications made to the court or a judge at chambers, in the course of the action, as where a party is obliged to amend his pleading: they are exclusively in the discretion of the court, and are recovered by writ of execution in the way I have already pointed out.

Final costs are given by various statutes, and generally follow the result of the action.

They differ entirely from the costs of interlocutory proceedings. To grant or to refuse these, rests with the court, or with the judge disposing of the matter out of which they arise. Final costs, again, as they are only given but by positive statutes, cannot, when so given, be taken away, except by an enactment equally positive.

Costs have formed the subject of an unbroken *series of enactments, from the Statute of Gloucester, passed in the reign of Edward the First, down to the Common Law Procedure Act, and the subject is consequently complex and confused in the extreme. Twenty years ago, the then Common Law Commissioners recommended that this branch of the law should be rendered intelligible, by being consolidated

(a) R. G. T. T. 1853, 32.

and comprised within a single act of parliament. This has not yet been done; and any attempt to explain the subject would demand as much space as has been given to the whole subject of the present treatise. (b)

CHAPTER XI.

PROCEEDINGS AFTER THE JUDGMENT.

UPON the *judgment* of the court, if it remain unsatisfied, *execution* will generally follow, unless the party against whom the judgment has been given thinks himself aggrieved by the proceedings. In such a case his ordinary remedy is to reverse the judgment by bringing error.

A judgment may be either satisfied by payment of the debt or damages and costs, or in some cases of costs alone, awarded by it, or there may be good cause why execution on it should not issue. This cause may arise either from extrinsic facts relating to the action—for instance, a good defence may have arisen since the judgment was awarded,—or from the fact of the judgment itself being intrinsically bad.

1. *Satisfaction.*

As a judgment affects the estate of the party against whom it is given, it is clearly his interest that where it has been satisfied, it should appear to be so in the rolls of the court. This is effected by entering satisfaction on the roll. In order to do so, it is requisite only to produce a satisfaction-piece in the subjoined form, which must be signed by [806] the party acknowledging the same, or his personal representatives. Such signature or signatures must be witnessed by a practising attorney of one of the courts of Westminster, expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction-piece before the same is signed; and the attorney must declare himself, in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney. (a) In cases where the satisfaction-piece is signed by the personal representative of a deceased party, his representative character must be proved in such manner as the master may direct. (bb)

The following is the form of the satisfaction-piece:—

In the Queen's Bench:

Monday, the day of A. D. 18 .
[Middlesex] *to wit.*—*Satisfaction is acknowledged between A. B.*

(b) A volume on the "Law of Costs" has recently been published by John Gray, Esq., in which the subject is treated at length, and with a clearness and an accuracy, which on such a subject would scarcely have been credible.

(a) R. G. H. T. 1853, 80.

(bb) R. G. H. T. 1853, 80. It may be proved by production of the probate or letters of administration.

plaintiff, and C. D., defendant in an action for and
 : And I, the said A. B. do hereby expressly nominate and
 appoint H. J. S., attorney-at-law, to witness and attest my execution of
 this acknowledgment of satisfaction."

"Judgment entered on the day of in the year of
 our Lord 185 Roll No.

Signed by the said A. B. in the presence
 of me, H. J. S., of one of the attor-
 neys of the court of Queen's Bench at
 Westminster. And I hereby declare myself
 to be attorney for and on behalf of the said
 A. B., expressly named by him and attend-
 ing at his request to inform him of the
 nature and effect of this acknowledgment of
 satisfaction (which I accordingly did before
 the same was signed by him). And I also
 declare that I subscribe my name hereto as
 such attorney.

[A. B.]

the above-named plaintiff.

[The of ,
 in the year of our Lord,
].

H. J. S.

*2 Audita Querela.

[*307]

But there may be good reason why execution should not issue at all, even without judgment being satisfied. In this case the defendant is evidently in danger of execution, unless he takes some step to prevent its being issued. This is done by suing out a writ of Audita Querela, which is directed to the court in which judgment has been given, and after stating that the complaint of the defendant has been heard, audita querela defendantis, and setting out the matter of the complaint, it enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them. We have seen that if a defence arises to a defendant at any time before the verdict is given, it may be pleaded puis darrein continuance. It is by a writ of audita querela that a defence, arising after verdict and judgment, is made available to the defendant, who in this proceeding, however, becomes plaintiff. Thus the plaintiff in the action may have given him a general release, or he may have paid the debt to the plaintiff, without procuring satisfaction to be entered on the roll. In either case he is entitled to be relieved against the oppression of the plaintiff, if he sues out execution on the judgment. So this writ of audita querela lies for bail, when judgment has been obtained against them to answer the debt of their principal, and it happens afterwards that the original judgment against the principal is reversed; for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by audita querela. "But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of audita querela, and driven it quite out of practice," and,

indeed, it cannot be sued out without a rule of court or the order of a judge to that effect.^(c)

[*308] *But the ordinary mode of redressing erroneous judgments is by bringing *Error*, which only lies upon matter of *law* arising on the record; there being no means of reversing an error in the determination of *facts*, but by a new trial.

After final judgment, then, the unsuccessful party may bring *Error*, that is, allege that there is error *on the record*, and that the judgment of the court given against him ought for that reason to be reversed.

Error is brought on one of two grounds; 1, for *Error in fact*; 2, for *Error in law*.

Error in Fact.

There is, as has been observed, no appeal against the decision of a jury on a question of fact, except by motion for a New Trial. That the jury have wrongly decided a matter of fact, affords ground for sending the disputed question of fact for decision by another jury, but it does not constitute any error in the proceedings of the court. So if there is matter of fact which, if pleaded, would have led to a different judgment, the existence of such matter of fact does not after judgment constitute error in the record. But there are certain facts which go to the *validity* of the proceedings themselves. Thus, if a defendant under age appears by attorney, and not by guardian, or a female plaintiff sues as a *femme sole* while she is in fact a married woman,—either fact constitutes error *in fact*, and is sufficient to reverse the judgment; for the infant could not appoint an attorney to defend him, and the married woman could not sue at all.

An error in fact of this nature appears on the record: and the court, therefore, on inspection of the record, recalls its former judgment, and alters it, because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment. Error in fact is thus brought in the Court itself, by which the judgment alleged to be erroneous has been given. It does not lie in the Court of Exchequer Chamber or in the House of Lords, which are properly speaking the Courts of Error.

[*309] *The party, alleging error in fact, must deliver to one of the masters of the court a memorandum, in writing, entitled by the court and cause, and signed by the party or his attorney, alleging that there is error in fact in the proceedings. This memorandum is in the subjoined form:—

In the Queen's Bench:

The day of in the year of our Lord 18 .

[The day of lodging note of error].

A. B. and C. D. in error.

The plaintiff [or defendant] says that there is error in fact in the

(c) R. G. H. T. 1853, 79. As to this proceeding, see the recent cases of *Giles v. Hutt*, 1 Ex. 59, 701; *Dewrie v. Ker*, 4 Ex. 82; *Williams v. Roberts*, 1 L. N. & P. 381.

record and proceedings in this action, in the particulars specified in the affidavit hereunto annexed.

(Signed)

A. B., plaintiff,
[or C. D., defendant,]
[or H. J. S., attorney for plaintiff
[or defendant].]

It must be accompanied with an affidavit of the matter of fact in which the alleged error consists.(d) The master files the memorandum and affidavit, and delivers to the party lodging the same a note of the receipt thereof. A copy of such note and affidavit is then served by the opposite party or his attorney, the effect of which is, that execution is at once stayed, and cannot issue without a special order of the court or a judge.(e)

Within eight days after the filing with the master of the memorandum of error in fact, the plaintiff in error must assign the error. In default, the defendant in error may sign judgment of non pros.(f)

The assignment of error in fact, which is in the nature of a declaration, is delivered to the attorney of the defendant in error, with a notice to plead thereto (either indorsed thereon or delivered separately) in four days, otherwise judgment.(g) The defendant must plead or demur within the four days, otherwise judgment of reversal will be signed.

*The defendant in error may plead specially, by confessing and avoiding the fact assigned, or generally, by denying it; or he [*310] may demur, or plead that there is no error, which is a plea in the nature of a demurrer. An issue in law or in fact is thus joined. The former is argued as a demurrer, the latter goes down to trial as in ordinary cases.

Notice of trial, and all other proceedings thereon, are the same as in issues joined in an ordinary action.(h)

The defendant in error is at liberty to confess error, and consent to the reversal of the judgment, by giving the plaintiff in error a notice, stating that he confesses the error, and consents to the reversal of the judgment. Thereupon the plaintiff in error is entitled to, and may forthwith sign a judgment of reversal (s. 160).

Where, for error in fact, judgment is reversed, each party pays his own costs in error; as to which, and for the writ of restitution, when execution has been executed, see Wms. Saund. 101 gg. A more summary redress, than the writ of restitution, may in some cases be had by the party injured applying to the court, to have restored to him all that he has lost.(i)

Error in Law.

There is error in law, when the judges on the face of the record

(d) See a form *Birch v. Trist*, 8 East, 415.

(e) *Simple v. Turner*, 6 M. & W. 152.

(f) R. G. H. T. 1853, 64.

(h) R. G. H. T. 1853, 66.

(g) *Ibid.* 65.

(i) 1 Chit. 511.

appear to have committed a mistake in point of law, as, where they may have wrongly decided an issue in law brought before them on demurrer.

Error upon judgments of either of the three Superior Courts is heard and determined only by the judges, or judges and barons, as the case may be, of the other two courts, sitting as judges in the Court of Exchequer Chamber. Upon the judgment of the Exchequer Chamber, error again lies to the House of Lords, the decision in which is final.^(k)

[*811] *In order to understand the nature of the proceedings in bringing Error in Law, it must be recollected that in giving judgment, the court is always supposed to examine the whole record, and thereupon to give judgment for the plaintiff or defendant, according to the law, as it appears on the face of the record, irrespective of the findings on the issues in fact; because, as we have seen, immaterial issues may be raised, and the facts found may therefore be of no moment. When judgment, therefore, has been given for one party, when, on the whole record, it ought to have been for the other, there will be an error *in law*. Thus, on a judgment by default or *nil dicit*, error will lie, although the judges have never even seen the record. So in cases in which a defendant may move in arrest of judgment, error will lie, although the plaintiff may have signed judgment on the *postea*, issued execution, and levied his debt and costs, the actual judgment not having been at the time entered on the roll. So in cases in which judgment *non obstante veredicto* may be moved for, error may be brought, the judgment following on the bad plea being of no value, and yet good as a judgment, and as a foundation for execution, until reversed in error.

Bringing error is, as I have already stated, the only mode of giving effect to a bill of exceptions. After the trial the bill of exceptions, drawn up by the party tendering the exceptions in a technical form, from the notes of the counsel taken at trial, is attached to the record, of which it then forms a part. The judgment of the court follows the finding of the jury, irrespective altogether of the bill of exceptions.^(l) To reverse that judgment, error is brought in order to bring the whole record, with which the bill of exceptions is now incorporated, before the Court of Error. On the argument, the exceptions, as part of the record, are discussed, and if sustained, the judgment of the court below (which that [*812] court, it may be observed, has never seen) is reversed, and a new trial ordered, or such other *judgment given as ought to have been given by the court below. Error is brought in the same way on the judgment given by the court below on a special verdict; but in this case, as in the case of error brought on a judgment on demurrer, the judgment submitted to the review of the Court of Error is, in point of fact, a judgment of the court below.

Error in law must be brought within six years after judgment (s. 146). It is generally brought by the person against whom judgment has been given; but it may be brought by a plaintiff, to reverse an erroneous judgment in his own favour, and thus enable him to bring another and a better action. The party who brings error must be a party to the judg-

(k) Ante, p. 41.

(l) *Davenport v. Tyrrell*, 1 Wm. BL 675.

ment or privity to it. One or more of several persons against whom a judgment has been given may bring in error, the proceedings in such cases being in the name or names only of the parties bringing error (s. 154).

Proceedings in Error.

The party alleging error does so by delivering to one of the masters of the court, in which the action was brought, a memorandum, entitled in the court and cause, and signed by the party or his attorney, simply alleging that there is error in law in the record and proceedings.

The following is the form of memorandum :—

In the Queen's Bench :

The day of in the year our Lord 18 .

[The day of lodging note of error.]

A. B. and C. D.

The plaintiff [or defendant] says that there is error in law in the record and proceedings in this action; and the defendant [or plaintiff] says that there is no error therein.

(Signed) A. B., plaintiff,
 [or C. D., defendant,]
 [or E. F., attorney for plaintiff,
 or defendant].

*The master files this memorandum, and delivers to the party lodging the same a note of the receipt thereof. A copy of such [*313] note, together with a statement of the grounds of error intended to be argued, is then to be served on the opposite party or his attorney.

From the time of the service of this note, and of the grounds of error, until default in giving security (four days afterwards), or until the judgment be affirmed or the proceedings be discontinued, bringing error as above is a supersedeas of execution (s. 150).

Immediately, therefore, on obtaining the note from the master, a copy of it should be made, the statement of the grounds of error annexed, and both served on the opposite party. This service should be made *before* the other party is entitled to sign judgment, so as to prevent execution, which, if issued, will be set aside.(m)

If the note contains *no statement* of the grounds of error intended to be argued, the defendant in error may issue execution at once;(n) but if a statement is made, however frivolous the grounds of error alleged may appear to be, the defendant in error must apply for leave to issue execution, which will be ordered to issue if the grounds of error intended to be argued are evidently frivolous. "A party is entitled to a writ of

(m) *Somerville v. White*, 5 East, 145; 2 Wms. Saund. 101.

(n) 1 Chit. Arch. 488; Bagley's Pr. 344.

MARCH, 1854.—15

error ex debito justitiæ; and unless the causes of error are clearly frivolous we cannot interfere.”(o)

Execution cannot issue on the original judgment (except by order of the court or a judge), until default in putting in bail (s. 151), affirmance of the judgment (s. 155), discontinuance by the plaintiff in error (s. 159), or until the proceedings in error be otherwise disposed of without a reversal of the judgment, as by a judgment of non. pros. (s. 153).

[*314] *Execution on the judgment will not be stayed, then, unless the party bringing error within four days become bound with two sureties, to the party in whose favour judgment has been given, in double the amount awarded by the judgment, and also to pay to him all further costs and damages, if the judgment be affirmed or the proceedings in error discontinued (s. 151).

The defendant in error has thus notice, that proceedings have been taken to set aside the judgment. His course is now to ascertain whether or not there is error in the record. Either there is error, or there is not. Suppose, in the first place, then, that *there is no error*. If so, the defendant has nothing to do. The plaintiff will suggest on the roll that there is error, and add to his own *Suggestion of error* the defendant's denial, technically his *Joinder in error*, in the same form as the memorandum of error lodged with the master.

The roll must for this purpose be made up by the plaintiff. The whole proceeding must be copied on parchment as in the case of the *Nisi Prius Record*, the *postea* inserted, the judgment of the court below added in proper technical form, and the roll deposited in the treasury of the court below. This is the judgment roll, to which must be added the suggestion of error, which must be done within ten days after the service of the note of the master, acknowledging the receipt of the memorandum alleging error, or within such other time as the court or a judge may order. In default, the defendant in error is at liberty to sign judgment of non pros. (s. 153), which will be signed by one of the masters of the court in which the original judgment was given, who will also tax the defendants' costs, upon which execution may be immediately issued (s. 155).

Upon the suggestion of error alleged and denied being entered on the roll, the cause may be set down for argument in the Court of Error by either party, who must forthwith give notice in writing to the [*315] *opposite party, and proceed to the argument thereof as on a demurrer.(p)

Four clear days before the day appointed for argument, the plaintiff in error must deliver copies of the judgment-roll of the court below, to certain of the judges, and the defendant in error copies to certain other judges of the Court of Exchequer Chamber, before whom the case is to be heard. In default by either party, the other party may, on the fol-

(o) Per Parke, B., in *Gardner v. Williams*, 3 Dowl. 796.

(p) R. G. H. T. 1853, 67; ante, p. 255.

lowing day, deliver such copies as ought to have been delivered by the party making default; and the party making default will not in such case be heard, until he shall have paid for such copies, or deposited with the master a sufficient sum for that purpose.(q)

The judgment roll is brought by the master into the Court of Error in the Exchequer Chamber on the day of its sitting. The particular days on which the arguments in error will be heard are always appointed by the judges in the beginning of each term.

The Court of Error, after argument, as in the case of a demurrer, reviews the proceedings, and gives judgment as they are advised thereon. This judgment, as altered or affirmed, is entered on the original record; and such further proceedings, as may be necessary thereon, are awarded by the court in which the original judgment was given (s. 155).

After judgment has been given in the Court of Error, either party is at liberty to enter the proceedings in error on the judgment-roll, which is returned to the court below, from which execution for the costs in error is issued as in ordinary cases, for these costs are taxed and allowed as costs in the cause.(r)

Error is brought in the House of Lords on a judgment of the Court of Exchequer Chamber in the same way; the judgment-roll being carried on to the High Court of Parliament by the master of the *court [*316] in which the original judgment was given (s. 155).

But, in the second place, it may so happen that *there is error* in the record. If this be the case, the defendant, it is clear, must adopt one of two courses. He must either confess the error, or show affirmatively that the plaintiff has no right to take advantage of it.

If the defendant, then, cannot defeat the right to bring error, to which we have seen every litigant is entitled *ex debito justitiæ*, he may confess the error, by giving the plaintiff a notice to that effect, on which judgment of reversal may be signed (s. 160), the effect of which I have already stated, in reference to the confession of error *in fact*.

If, however, the defendant in error intends to rely upon the proceeding in error being barred by lapse of time, or by release of error, or other like matter of fact, he must give four days' written notice to the plaintiff in error, to assign error instead of entering a suggestion of error.

The assignment of errors is in the nature of a declaration, stating the grounds on which the plaintiff imputes error on the record; nothing being assignable for error that contradicts the record itself. The plaintiff can assign only *one error in fact*. He may assign *several errors in law*; but errors in law and error in fact cannot be assigned together.(s)

The plaintiff in error must assign error within four days after receiving the notice to do so, though he may obtain further time from the

(q) Ibid., 68.

(s) 2 Wms. Saund. 101.

(r) Ibid., 69.

court or a judge, otherwise the defendant may sign judgment of non pros. (s. 153).

The assignment is delivered to the defendant's attorney with a notice to plead thereto in eight days, otherwise judgment.(f)

[*317] *The defendant in error must plead within the eight days unless the time be extended (s. 152). He must confess in his plea that the record is erroneous, but show that the plaintiff cannot take advantage of it. Thus, he may show a *Release of Errors*, or plead the *Statute of Limitations*. To this plea the plaintiff replies or demurs, and the defendant again demurs or rejoins, so that ultimately an issue of law or in fact is joined.

When an issue in law is joined, either party may set down the case for argument, give notice to the other party, and proceed as in the case of a simple assignment of error in law and joinder therein.

If an issue in fact is joined, the issue must be made up, and be taken down for trial as in ordinary cases, except that the defendant in error may go down to trial *by proviso*, without waiting for a default by the plaintiff.

The judgment of the Court of Error may be either in affirmance of the former judgment; or that it be reversed for error in law; or that the plaintiff be barred of his right to bring error, as when a plea of *Release of Errors*, or of the *Statute of Limitations*, has been found for the defendant. But the Court of Error may always give such judgment, and award such process, as the court below ought to have given (s. 157). Thus it may award a repleader, or direct a trial *de novo*.(u)

If execution has been levied, the plaintiff is entitled to a writ of restitution, and thereby recovers all that he has paid.

When the judgment of the court below is affirmed, or the plaintiff in error non prossed, the defendant is entitled to damages and costs, as well as to interest upon the sum awarded him by the court below, for the time that execution has been delayed; and the *master, on tax-
[*318] ing the costs, may compute such interest, without any rule of court or order of a judge for that purpose.(v)

And here I may add that in no case can error be brought for any error in a judgment with respect to costs; but the error (if any) in that respect may be amended by the court, in which such judgment has been given, on the application of either party.(w)

If the judgment of the court below is reversed, each party pays his own costs.

(f) R. G. H. T. 1853, 47.

(u) R. G. T. T. 1853, 24.

(v) Ibid., 26.

(w) Ibid., 27.

CHAPTER XII.

EXECUTION.

THE last step in an action is the execution of the judgment, by which the sentence of the law is enforced against him who does not render to it a willing obedience.

I have been obliged to mention, in describing the different steps in an ordinary action, the various circumstances in which judgment may be signed against either of the parties to the suit. I have endeavoured to point out when it was interlocutory, and when final. I have also explained the nature of the different judgments, which may be thus signed in the course of the proceedings; and I have shown that the costs incurred in the various incidental applications made to the court, or to a judge at chambers, may be made the subject of a judgment, and be recovered by writ of execution. I am now to treat of this final process itself; and I purpose to do so by mentioning, *first*, the general requisites of writs of execution; *secondly*, the time within which they must be sued out, and the mode in which they may be renewed; *thirdly*, the manner in which a judgment is revived, when a change of circumstances [*319] has made this necessary; *fourthly*, as incidental to this branch of my subject, the abatement of actions generally; and *fifthly*, the nature and effect of the different writs of execution in use in the superior courts.

The Requisites of Writs of Execution.

We have seen how judgment may be signed by non pros, or nil dicit. In neither case is the formal judgment of the court entered on the roll. So when judgment is signed on the *postea* after a verdict, costs may be taxed, and execution issued on the *incipitur*. In the same way, after proceedings in error, judgment is, in ordinary cases, merely signed, without being engrossed in technical form on the roll. Indeed it is not necessary before issuing execution upon any judgment whatever, to enter the proceedings on any roll.^(a) But when execution is to be issued, the writ of execution having been, like all other writs prepared by the party who intends to issue it, is taken to the office of the Court, and there sealed, on production of the *incipitur*, or judgment paper, *postea*, or *inquisition*, as the case may be.^(b)

Like other judicial writs, every writ of execution must bear date on the day on which the same is issued, and be tested in the name of the Chief Justice or Chief Baron of the court from which it issues, or, in case of a vacancy of the senior puisne judge, it may, and, in certain cases, must be made returnable on a day certain in term.^(c)

It must be also indorsed with the name and abode or office of the

(a) R. G. H. T. 1853, 70.

(b) R. G. H. T. 1853, 71. A *præcipe* must also be filed with the proper officer.

(c) R. G. H. T. 1853, 72.

attorney suing out the writ, and in case such attorney is not an attorney of the court, then also with the name and abode or office of the attorney of such court in whose name such writ is taken out; and when the attorney suing out any writ, sues out the same as agent for an attorney [*820] in the country, the name and abode of such attorney in the country must be indorsed. If no attorney is employed, it must be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, mentioning his residence as in the case of a writ of summons.(d)

The object of these memoranda is to fix the party suing out the writ with liability for everything done under colour of it; for no one must set the law in motion until he is in a position to do so with safety. Accordingly, it is further required that every writ of execution be indorsed with a direction to the sheriff, to levy the money really due and payable under the judgment, stating the amount.(e)

And the person issuing a writ of execution cannot be too careful in fixing the amount to be levied, for if he indorse too little, he may lose the residue altogether; if he indorse too much, he may expose himself to an action.

The writ being prepared, sealed, and properly indorsed, is put into the hands of the sheriff, or his deputy in London, for execution, with such information, according to the nature of the writ, as the party can give. The responsibility for the due execution of the writ rests thereafter with the sheriff, who is bound at common law to execute all the writs of the sovereign, without fee or reward, but is now entitled to certain fees,(f) and a poundage upon the amount levied.(g) In every case the sheriff may levy the poundage fees and expenses of the execution over and above the sum indorsed on the writ to be levied (s. 123). So that in this way the costs of the execution fall upon the party, who, by disregard to the judgment of the court, has rendered it necessary that that judgment should be enforced against his person or his property.

2. *When Execution may issue.*

During the lives of the parties to a judgment, *and within six [*821] years from the recovery of the judgment, execution may now issue without a revival of the judgment (s. 128).

Formerly, when a year and a day had elapsed without execution being issued on a judgment, the law presumed it to be satisfied, and at common law the only remedy (in personal actions) was by an action of debt on the judgment. The stat. of West. 2, c. 45, enabled a scire facias, or warning, to be issued, on which, failing appearance or defence, execution might be obtained.

Execution may now be issued within six years, but in the case of the death of any of the parties, a suggestion on the record or a writ of revivor

(d) R. G. H. T. 1853, 73.

(f) 7 Will. IV. and 1 Vict. c. 55; 5 & 6 Vic. c. 98.

(e) Ibid. 76.

(g) 28 Eliz. c. 4.

will be necessary. Execution issued after the six years, however, will be only voidable,^(h) and not void.⁽ⁱ⁾

A writ of execution remains in force for one year only, from the teste of such writ, unless renewed. It may, at any time before its expiration, be renewed by the party issuing it, for one year from the date of such renewal; and so on from time to time during the continuance of the renewed writ, either by being marked with a renewal seal kept for that purpose at the office of the master; or by such party giving a written notice of renewal to the sheriff bearing the like seal of the court. A writ of execution so renewed has effect, and is entitled to priority, according to the time of the original delivery thereof (s. 124).

Formerly writs of execution remained in force until executed, and great mischief followed in many ways. A writ is operative from the time it is delivered to the sheriff to be executed. If he takes the goods of a debtor under a subsequent *fi. fa.*, and not under the first which has been put into his hands, he is liable to the earlier creditor. So, if under a *ca. sa.* issued one day, he takes the debtor, and upon satisfaction of the debt inadvertently lets *him go, he is liable to a creditor who [^{*322}] lodged a *ca. sa.* ten years before. In order to be safe, the sheriffs accordingly keep books in which all writs are entered, and when they have a writ to execute, their first care is to see, if there is any other writ against the same person. There may be many on which the claims have been satisfied; whether this has been done or not must be ascertained by the sheriff, in each case before he can let the prisoner go, to the great inconvenience of the sheriff, the delay of the creditor, and the great hardship of the debtor, who suffers a fearful penalty if his name be a very common one, as he may be any one of the persons of the same name. Nor is this all: a creditor may have lodged a writ years ago, and taken no further trouble, while some other creditor, more alert, finds out the debtor's goods, lodges his writ, and tells the sheriff where to levy; the first judgment creditor reaps the benefit. Worse, however, remains—a claim may be satisfied, and the evidence of the transaction be lost—the writ remains apparently unexecuted, and the debtor must pay again.

The only remedy for these manifest evils which the ingenuity of the Commissioners, recently appointed to report on the procedure of the Courts of Common Law, could suggest, was to limit the duration of writs. This has been done, as I have above pointed out, and writs now remain in force for a year only; but that this may not operate unfairly in cases where a party is entitled to priority, a writ may be renewed, from year to year, without being taken from the sheriff's hands.

3. *The Revival of Judgments.*

Formerly when a writ of execution was not issued within a year and a day after the judgment, the judgment, we have seen, was presumed to

(A) *Goodtitle v. Badtitle*, 9 Dowl. 1009.

(i) *Blanchenay v. Burt*, 3 G. & D. 613.

be satisfied, and it became necessary to revive it. This was done by *Scire Facias*, a writ directed to the sheriff of the county in which the venue in the original action was laid, of which writ notice was given to [823] the *defendant, the writ of *sci. fa.* partaking in this way of the nature of an original writ. On the return of the writ of *sci. fa.*, if the defendant appeared, proceedings similar to those in ordinary actions took place, to determine simply whether or not the defendant remained liable. If the defendant failed to appear, judgment was signed. A similar proceeding was resorted to where, between judgment and execution, there had been a change, by death or otherwise, of the parties by or against whom execution was to be issued—technically an *abatement of the action*.

This was found in practice to be a tedious form, where the fact to be established was of so simple a character, that it might well be adjudged upon without the expense and delay of a regular action, which, as I have said, a *scire facias* was. There were objections to that proceeding. The writ was directed to the sheriff of the county in which the venue in the action had been laid, instead of to the party whose appearance was required. Delay was necessarily incurred, also, from the writ being tested and returnable in term; so that if a judgment creditor died on the 16th of June, his representative was unable to compel the judgment debtor to answer to a *scire facias* to revive the judgment before the month of November following; although the only fact to be established, to entitle the representative to execution, was the probate of the will, or the letters of administration of the effects of the deceased, documents the validity of which is exclusively within the jurisdiction of the Ecclesiastical Courts, and which prove themselves by mere production at a trial in a Court of Common Law.

The writ of *scire facias quare executionem non* has not been abolished, because, although in many cases the same effect may be obtained by an action on the judgment, there are many other cases in which the proceeding by *scire facias* is more beneficial,—as, where it is sought during the judgment debtor's life-time, or after his death, as against his heir and [824] *terre-tenants*, to extend freehold land, of *which he was seised at the date of the judgment; an object which cannot be obtained by an action upon the judgment.

The writ of *scire facias* is in many cases retained, but it is under the new name of a "*Writ of Revivor*;" and I have, therefore, in the previous part of this treatise, (k) thought it better to consider *revivor* a separate and distinct form of action altogether.

In cases, then, where it becomes necessary to revive a judgment, by reason either of lapse of time or of a change by death or otherwise of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of *revivor*, or apply for leave to enter a suggestion upon the roll, and to issue execution thereupon.

(k) Ante, p. 152.

There are, therefore, two modes of reviving a judgment, viz.—by Suggestion on the Roll, and by Writ of Revivor.

The party alleging himself to be entitled to execution may apply to the court, or to a judge at chambers, for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the court that such party is entitled to have execution of the judgment, and to issue execution thereupon. Such leave is to be granted by the court or judge upon a rule to show cause, or a summons, which is to be served as rules and summonses generally are served, and which rule or summons may be in the form annexed, or to the like effect (s. 129).

[After the formal parts say]

*to show cause why A. B. [or E. F., as executor of the last will and testament of A. B., deceased] should not be at liberty to enter a suggestion upon the roll in an action wherein the said A. B. was plaintiff and the said C. D. was defendant, and wherein the said A. B. obtained judgment for £ against the said C. D. on *the day of that it manifestly appears to the court that the said A. [*825] B. [or E. F. as such executor as aforesaid] is entitled to have execution of the said judgment, and to issue execution thereupon, and why the said C. D. should not pay to the said A. B. [or E. F. as such executor as aforesaid] the costs of this application, to be taxed.*

The facts upon which the application is made, for instance, that judgment was signed more than six years before the date of the application, and is still unsatisfied, must be shown to the court by affidavits. If the application is made by executors, the affidavit must further show that probate of the will has been granted to them.^(l) So administrators making this application will have to show in the affidavit that administration has been granted to them.

The rule to show cause may be served abroad,^(m) but personal service will not be necessary, if the defendant can be shown to be avoiding the service of the rule.⁽ⁿ⁾

In case it manifestly appears that the party making the application is entitled to execution, the court or judge will allow a suggestion to be entered in the form annexed, and execution to issue thereupon (s. 130).

And now, on the day of it is suggested, and manifestly appears to the court, that the said A. B. [or E. F. as executor of the last will and testament of the said A. B., deceased, or otherwise as the case may be] is entitled to have execution of the judgment aforesaid against the said C. D. [or against G. H. as executor of the last will and testament of the said C. D. or as the case may be]: therefore it is considered by the court that the said A. B. [or E. F. as such executor as aforesaid,

(l) Vogel v. Thomson, 1 Ex. 60.

(m) Stockport v. Hawkins, 1 D. & L. 204.

(n) Dixon v. Thorold, 9 Dowl. 827.

or otherwise, as the case may be] *ought to have execution of the said judgment against the said C. D. [or against G. H. as such executor as aforesaid, or as the case may be.]*

The rule or order will also specify whether or not the costs of the application are to be paid to the party making the same.

[*826] *In case it does not manifestly appear that the party making the application is entitled to execution, the court or judge will discharge the rule or dismiss the summons with or without costs; but in such case the party making the application is at liberty to proceed by writ of revivor or action upon the judgment (s. 180).

The writ of revivor is a judicial writ, and is to be directed to the party called upon to show cause why execution should not be awarded, and to bear teste on the day of its issuing. After reciting the reason why such writ has become necessary, it calls upon the party, to whom it is directed, to appear, within eight days after service thereof, in the court out of which it issues, to show cause why the party at whose instance such writ has been issued should not have execution against the party to whom such writ is directed, and it gives notice that, in default of appearance, the party issuing such writ may proceed to execution (s. 131).

It may be in the form annexed, or to the like effect:—

VICTORIA, *by the grace of God, &c., to E. F., of Greeting.*

We command you that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our court of to show cause why A. B. [or C. D. as executor of the last will and testament of the said A. B. deceased, or as the case may be], should not have execution against you [if against a representative, here insert, as executor of the last will and testament of deceased, or as the case may be] of a judgment whereby the said A. B. [or as the case may be], on the day of in the said court recovered against you [or otherwise as the case may be] £ , and take notice, that in default of your so doing the said A. B. [or C. D. &c., as the case may be] may proceed to execution.

Witness, &c.

This writ, which will be sued out at the office of the court in which the original judgment was given, on a præcipe as in other cases, may be [*327] served in any *county, and otherwise proceeded upon, whether in term or vacation, in the same manner as a writ of summons (s. 131).

Notice in writing to the plaintiff, his attorney or agent, is a sufficient appearance to a writ of revivor (s. 133).

Such a notice may be as follows:—

In the Queen's Bench :

Between $\left\{ \begin{array}{l} \text{A. B., plaintiff,} \\ \text{and} \\ \text{C. D., defendant.} \end{array} \right.$

Take notice, that I appear for the defendant to the writ of revivor issued herein. Dated the day of 18 .

Yours, &c.

D. E. C., defendant's attorney [or agent].

To Mr. H. J. S., plaintiff's attorney
[or agent].

The venue, in a declaration upon such writ may be laid in any county ; and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be in the same as in an ordinary action (s. 131).

The defendant will not be allowed to plead to the declaration in revivor any matter which might have been pleaded or set up as a defence to the original action.(o) Fraud in obtaining the original judgment must be specially pleaded in this action, though it may also afford ground for moving to set aside the proceedings.(p)

A writ of revivor to revive a judgment less than ten years old will be allowed without any rule or order ; but if more than ten years old, not without a rule of court or a judge's order ; while, if the judgment be more than fifteen years old, the writ cannot be sued out without a rule to show cause (s. 134).

The judgment itself cannot be impeached on *showing cause [*828] against the rule, but a cross motion to set it aside should be made for that purpose.(q)

I may take this opportunity of pointing out that a similarity in the mode of proceeding in nearly all personal actions, brought in the Superior Courts at Westminster, has been secured by an enactment in the Common Law Procedure Act, to the effect that all writs of *scire facias* against bail on a recognizance ; *ad audiendum errores* ; against members of a joint-stock company or other body, upon a judgment recovered against a public officer or other person sued as representing such company or body, or against such company or body itself ; by or against a husband to have execution of a judgment for or against a wife ; for restitution after a reversal in error ; upon a suggestion of further breaches after judgment for any penal sum, or for the recovery of land taken under an *elegit*—are to be tested, directed, and proceeded upon, in like manner as writs of revivor.

4. The Abatement of Actions.

Connected with the subject of the revival of judgments is the abatement of actions by the death of the parties and otherwise.

(o) *Bradley v. Eyre*, 11 M. & W. 432.

(p) *Thomas v. Williams*, 3 Dowl. 655 ; *Dodgson v. Scott*, 2 Ex. 457.

(q) *Thomas v. Williams*, 3 Dowl. 655.

In the event of the death of one or more of several plaintiffs or defendants, if the cause of action survives, the death may be suggested on the record (s. 136), in this form :—

And hereupon, that is to say, on the day of in the year of our Lord, one thousand eight hundred and fifty the plaintiff A. B. [surviving plaintiff], suggests, and gives the court here to understand, and be informed, that the plaintiff N. J., [deceased plaintiff], departed this life on the day of in the year of our Lord one thousand eight hundred and fifty ; and that he, the said A. B., survives him.

The action may, thereafter, proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants (s. 136).

[*329] *In the case of the death of a sole plaintiff, a suggestion may be entered by the representative, the truth of which, if it be made before the trial, may be tried thereat,—judgment, following in favour of the person making the suggestion, as if he had been the original plaintiff (s. 187). A suggestion of this nature may be in the following form :—

And hereupon, that is to say, on the day of in the year of our Lord one thousand eight hundred and fifty , J. K., by leave of the court [or of the Honourable Mr. Justice Talfourd], for this purpose first had and obtained, suggests and gives the court here to understand, and be informed, that on the day of , in the year of our Lord one thousand eight hundred and fifty , the plaintiff, A. B., departed this life, and that he, the said J. K., is the executor of the last will and testament of the said A. B. [or the administrator of all and singular the goods and chattels which were of the said A. B., who died], and as such is the legal representative of the said A. B.

In the case of the death of a sole defendant, a suggestion may be made of the death, and that a person therein named is the representative ;—and such representative may be served with a copy of the suggestion, and other proceedings, according to the stage at which the pleadings have arrived, on which the suit goes on as an ordinary action (s. 138). The suggestion in this case may be in the following form :—

And hereupon, that is to say, on the day of in the year of our Lord one thousand eight hundred and fifty , the plaintiff suggests and gives the court here to understand and be informed, that the said C. D. departed this life on the day of , in the year of our Lord one thousand eight hundred and fifty ; and that J. K. is executor of the last will and testament of the said C. D., [or administrator of all and singular the goods and chattels which were of the said C. D. at the time of his death, who died intestate.]

The death of either party between verdict and judgment will not be

error, if judgment be entered within two terms of the verdict (s. 139); and in the event of the death of either party, between *interlocutory and final judgment, the representative of the plaintiff, in [*330] actions which survive, may have a writ of revivor against the defendant, or if he die, against his representatives (s. 140).

Nor will the marriage of a female plaintiff or defendant cause the action to abate. Judgment may be executed *against* the wife, or, by suggestion or revivor, against the husband. Judgment *for* the wife may be followed by execution, by the husband's authority, without suggestion or revivor (s. 141).

5. *Writ of Execution in Ejectment, Replevin, and Detinue.*

I have already had occasion to mention the writ of *habere facias possessionem*, or writ of possession, which is directed to the sheriff of the county, commanding him to give actual possession to the claimant of the land recovered in the action of ejectment. The form of it is prescribed by Rule of Court.(r) In the execution of this writ, "the sheriff may take with him the posse comitatus, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of possession, is sufficient execution of the writ."

On a judgment in replevin, the writ of execution is the writ *de retorno habendo*; and if the distress be eligned, a *capias in withernam*; but on the plaintiff's tendering the damages, the process in withernam may be stayed. On a judgment in detinue, the plaintiff has a *distingas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels. He may also have a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered. If the defendant continues obstinate, then, in certain cases, after certain procedure, the sheriff may, on a writ of inquiry, ascertain the value of the goods, and the *plaintiff's damages, which [*331] may be levied under the ordinary writs of execution.

These writs in actions where money is recovered, whether debt, damages, or costs, are either against the body of the defendant, or against his goods and chattels, or against his goods and the *profits* of his lands; or against his goods and the *possession* of his lands, or against all three—his body, lands, and goods.

6. *Capias ad Satisfaciendum.*

By a writ of *capias ad satisfaciendum*, the body of the debtor may be imprisoned till satisfaction be made of the debt, damages, and costs. This writ may be issued into any county where the defendant can be found; and by it the sheriff of that county is commanded to take the

(r) R. G. H. T. 1853, Appendix.

defendant, and him safely keep, so that he may have him in court on the return day, to satisfy the plaintiff. It may be issued against any person not privileged from arrest, such as peers, members of the House of Commons, servants of the Crown, &c. It cannot be issued against a defendant who has been already held to bail on the action, and it ought not to be issued against any person otherwise protected from process.^(s) No defendant can be taken under it for a debt which did not exceed twenty pounds.^(t)

The writ of *ca. sa.* is an execution of the highest nature; and therefore when a debtor is once taken upon it, no other process can be resorted to against his property.

The sheriff has no power, instead of arresting the defendant, to receive the money. If the defendant wish to be liberated by payment, he must apply to the creditor, or his attorney, on whose written authority only the sheriff may liberate his prisoner (s. 126). On the day of his return, the sheriff generally returns *cepi corpus*, i. e., that he has taken the defendant, or *non est inventus*.

*If the sheriff has taken the defendant, he ought, in theory, [*332] to have him in court, to answer the plaintiff. But the person may have escaped from the custody of the sheriff, or have been rescued.

An escape is either voluntary or the result of negligence. A voluntary escape is by the express consent of the keeper, after which he cannot retake his prisoner again (though the plaintiff may retake him at any time,) but the sheriff must answer for the debt. A negligent escape is where the prisoner escapes without his keeper's knowledge, and then the defendant may be retaken, and the sheriff shall be excused, if he has him before any action brought against himself for the escape. A rescue of a prisoner *in execution*, does not excuse the sheriff from answering for the escape; for he ought to have sufficient force to keep him, since he may command the *posse comitatus*.

The sheriff to the writ of *ca. sa.*, may return *non est inventus*, i. e., that the defendant is not found within his bailiwick. If this return is made, the plaintiff may sue out a fresh writ into another county; or he may proceed to outlaw the defendant, with a view to forfeit his property to the Crown, who will, on petition, give it to the creditor in payment of his debt; or he may proceed against the bail, if bail was given in the action. Writs of *ca. sa.*, for the purpose of outlawry on final process, or to fix bail, must be made returnable on a day certain in term, and it is sufficient for either purpose that there be eight days between the tests and return.^(u)

A writ of *ca. sa.*, to fix bail must have eight days between the tests and return, and must, in London or Middlesex, be entered four clear days in the public book at the sheriff's office.^(v)

The bail, we may recollect, stipulated either that the defendant should satisfy the plaintiff his debt and costs; or, that he should surrender himself to custody; or, that they would pay for him; and the bail are

(s) Ante, p. 147.

(u) R. G. H. T. 1853, 74.

(t) 1 & 2 Vic. c. 110.

(v) Ibid., 75.

at *liberty to render the principal at any time, and entitled at any time to a warrant to apprehend him. The effect of the render [*333] is at once to discharge the bail.(w)

But if the principal does not pay the debt, and cannot be found by the sheriff, the bail must either render him to custody, or pay the plaintiff his debt and costs. The plaintiff fixes the liability of the bail, by suing out a writ of ca. sa.: if this writ is returned non est inventus, he may proceed on the recognizance of bail, which he does by suing out a writ of scire facias, which calls on the bail to show cause why the plaintiff should not have execution against them for his debt and damages. If they show no sufficient cause, or the defendant does not surrender, the plaintiff has judgment against the bail, and may then sue out process of execution against them.

Where the plaintiff proceeds on the recognizance of bail, the bail are at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period. On notice of the render being given, proceedings will be stayed upon payment of the costs of the writ and service thereof only.(x)

7. *Fieri Facias.*

The writ of fieri facias is so called from the words used when the writ was in Latin, commanding the sheriff, quod fieri facias de bonis, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered by the judgment. It is directed to the sheriff of the county where the party against whom it is issued has any goods or chattels; and is delivered generally to his deputy in London, with instructions where the goods may be found. The officer who is charged with the execution may not, in order to execute it, break open any outer doors, but must enter peaceably; *and he may then break open any inner door, belonging to the defendant, in order to take the [*334] goods.

Under a fi. fa. may be seized and sold any chattels belonging to the defendant, except his necessary wearing apparel: leases and terms of years may be taken and sold, growing corn, which would go to the executor, and also fixtures, when the writ is against a tenant who could remove them.

The 56 Geo. III., c. 50, and 14 & 15 Vict. c. 25, established a variety of exceptions in favour of landlords.

Goods which are mortgaged, or in the custody of the law (as under a distress,) cannot be taken. The sheriff must sell the goods within a reasonable time; but, before their removal from the premises, the landlord has a right to be paid a year's rent, if so much is due (8 Anne, c. 14, s. 1); and the arrears of taxes must also be paid (48 Geo. III., c. 99, s. 7.)

The effect of a fieri facias has been much extended by the stat. 1 & 2

(w) B. G. H. T. 1853, 106, 107.

(x) Ibid., 108.

Vict. c. 110, s. 12, which enables the sheriff to take money, bank-notes, bills of exchange, and other securities for money, belonging to the person against whom the writ is issued, and to hand over the money to the creditor, and sue for the amount of the bills and other securities.

When the writ is returnable, the sheriff may return that he has levied the amount, which he is ready to pay over; or, that he has taken goods which remain unsold for want of buyers; or, *nulla bona*, i. e., that the defendant has no goods within his bailiwick. If the sheriff neglects to pay over money, the creditor may obtain it by a rule of court in term time, or by a summons at chambers in vacation. If part only of the sum indorsed on the writ has been levied, or *nulla bona* returned, he may sue out a fresh writ of execution. If the return is, that the goods are unsold for want of buyers, he may sue out a writ of *venditioni exponas* commanding the sheriff to sell them. If the return is untrue, an action lies against the sheriff for a false return.

[*885] *And this is the proper place to mention, that at common law it is the absolute duty of the sheriff to take the goods of the person against whom the writ is issued; and if any claim be made to these goods by any third person, his duty then is to impanel a jury and try the question of property; and according as it is determined, to surrender the goods or sell them in terms of the writ. Before the Interpleader Acts about to be mentioned, it was usual for the sheriff, when a claim was made to goods which he had taken in execution, on a suggestion of the fact to the court, to have the time for making his return to the writ enlarged; until the right to the goods could be determined; or the sheriff could get a sufficient indemnity from the execution creditor. Now, however, (by the 1 and 2 Will. IV., c. 58, and 1 and 2 Vict. c. 45,) if after the sheriff has seized the goods, a third party starts up and claims them as his, the sheriff may apply to a judge at chambers for a summons (generally termed an interpleader summons) directed to the execution creditor and the party claiming the goods, and calling upon them to appear and maintain their respective claims to the goods seized in execution. This the parties generally do, and the judge, in the majority of cases, directs "an interpleader issue," as it is termed, to try the right of property in the goods. This issue may be in the following or a similar form:—

In the Queen's Bench:

On the day of in the year of our Lord, one thousand
eight hundred and fifty .

Surrey.—A. B., the plaintiff in this suit [the claimant of the goods] and which said suit has been ordered and now proceeds under and by virtue of an order of interpleader duly made in that behalf, according to the statutes in force in that behalf, by the Honourable Sir William Erle, Knight, one of the Justices of Her Majesty's Court of Queen's Bench at Westminster, bearing date the day of one thousand eight hundred and fifty , by H. J. S., his attorney, complains of C. D., the defendant in this suit [the execution creditor] for that before and at the

time of the discourse hereinafter mentioned the Sheriff of the *County of Surrey had seized and taken in execution certain [*336] goods and chattels as and for the goods and chattels of one R. G. [the debtor] under and by virtue of a certain writ of fieri facias, theretofore issued out of the court of Queen's Bench at Westminster, against the goods and chattels of the said R. G. at the suit of the now defendant, and directed and delivered to the said Sheriff, and thereupon a certain discourse was had between the said plaintiff and the now defendant, wherein a question arose [viz.] Whether the said goods at the time of the delivery of the said writ of fieri facias to the said Sheriff were the property of the plaintiff. And in that discourse the plaintiff asserted that the said goods at the time of the delivery of the said writ to the said Sheriff were the property of the plaintiff, which assertion of the plaintiff the now defendant then denied and asserted to the contrary thereof; and the plaintiff in fact saith that the said goods at the time of the delivery of the said writ of fieri facias to the said Sheriff were the property of the plaintiff.

And the defendant, by D. E. C., his attorney, says that the said goods at the time of the delivery of the said writ of fieri facias to the said Sheriff were not the property of the plaintiff as alleged.

And the plaintiff joins issue upon the plea of the defendant.

Therefore let a jury come, &c.

Upon this issue the parties go to trial as in ordinary cases. The costs are exclusively in the discretion of the court. The judgment may be moulded to suit the circumstances of the case, and that judgment is not subject to the review of a Court of Error.

There are several other provisions of the Interpleader Acts, for the benefit of stakeholders and others, having property which they wish to surrender only to the right owner; but on the consideration of these it is impossible at present to enter.

So much, then, for the writ of fieri facias, by which the goods, chattels, money, and valuable securities of a person against whom the writ is issued may be taken and sold to satisfy the judgment of the executive creditor.

This is also the proper place to mention another *means, which a creditor has of enforcing payment of a judgment debt; and [*337] which may be resorted to in order to get at property which cannot be reached by the writ of fieri facias. On the application of any creditor who has entered up judgment in one of the superior courts, a judge in chambers may order that the property of the debtor in government stock, or in the stock of any public company in England, corporate or otherwise, whether standing in his own name or the name of any person in trust for him, shall stand charged with the payment of the amount for which judgment has been recovered. No proceedings, however, can be taken in order to have the benefit of such charge till after six calendar months from the date of the order; and if the judgment creditor, after obtaining such charge, and before the realization of the property, takes the person

MARCH, 1854.—16

of the debtor in execution upon the same judgment, he shall be deemed to have relinquished his charge.

The law does not at present furnish a judgment creditor with any means of attaching the money of his debtor, in the hands of a third party. But the Common Law Commissioners (2nd Report, 1853) have recommended that the Superior Courts should be empowered to issue an execution, similar to the process of foreign attachment in the city of London, by which this may be effected, and a creditor enabled to attach the money due to his debtor.

8. *Levari Facias.*

By the writ of *levari facias*, which commands the sheriff to levy the debt on the lands and goods of the defendant, the sheriff may seize all his goods, and *receive the rents and profits* of his lands till the judgment be satisfied. But this writ is little used in practice, the remedy by *elegit*, which takes *possession of the lands* themselves, being much more effectual. Of this species, however, is the writ of execution proper only to ecclesiastics, which issues when the sheriff, to an ordinary writ of execution, [*338] "returns that the defendant is a beneficed clerk, not having any lay fee. "In this case a writ goes to the bishop of the diocese, "in the nature of a *levari* or *fieri facias*, to *levy* the debt and damage de "bonis ecclesiastics, which are not to be touched by lay hands : and there- "upon the bishop sends out a *sequestration* of the profits of the clerk's "benefice, directed to the churchwardens, to collect the same and pay "them to the plaintiff, till the full sum be raised."

9. *Elegit.*

An *elegit* is a writ first given by the Statute of Westminster (13 Edw. I., c. 18), which enacts that where a debt is acknowledged or recovered in the King's Court, it shall be *in the election* of him, who sues for such debt or damages, to have a writ of *fieri facias*, or that the sheriff deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and a *moiety* of his land, until the debt be levied by a reasonable price or extent.

At common law the judgment debtor could only have satisfaction out of the goods and chattels and present profits of the lands of the creditor, by the last-mentioned writs of *fieri facias* or *levari facias*. He could not have the possession of the lands themselves. This was a consequence of the feudal principle, which prohibited alienation by the tenant without consent of the lord, and of course the incumbering of the fief with the debts of the owner. When this restriction wore away, the consequence continued ; and no creditor could take *possession* of lands, but could only levy the growing profits ; so that, if the defendant sold his lands the plaintiff was without remedy. The Statute of Westminster, therefore, granted this writ (called an *elegit*, because it put it in the election of the plaintiff whether he would sue out this writ or one of the former) by

which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff at such reasonable appraisement and price, in *part of satisfaction of his debt. If the goods are not sufficient, then [*339] the moiety only of his freehold lands are, by the statute, to be delivered to the plaintiff. The sheriff is now, by 1 and 2 Vict. c. 110, s. 11, empowered to deliver unto the judgment creditor all the lands and hereditaments, including copyholds, as the person against whom execution is issued was seised or possessed of, at the time of entering up the judgment.

This writ may be had as well after the debtor's death as before it. The sheriff, on receiving it, empanels a jury, which inquires of the chattels of the defendant, and appraises them, and also inquires of his lands. The chattels are delivered to the creditor at the price at which they have been valued. [In executing a fi. fa., the sheriff must sell the goods which he has taken.] If the chattels are not sufficient to satisfy the creditor, the sheriff gives the creditor legal possession of the land, leaving him to obtain the actual possession by ejectment, if necessary. When, by receipt of the rents and profits, the creditor has satisfied his demand, the defendant may recover his land by an application to the court to take an account.^(y)

This execution or seizing of lands by elegit, is of so high a nature, that after it the body of the defendant cannot be taken; but, if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a capias ad satisfaciendum may then be had after the elegit; for such elegit is in this case no more in effect than a fieri facias.

10. Extent.

In certain cases, as in the forfeiture of recognizances or debts acknowledged by statute staple, body, lands, and goods may be taken in execution all at once. This is done by a process called an extent or *extendi facias*, because the sheriff is to cause the *lands, &c., before delivery to the creditor, to be appraised to their full extended value, that it [*340] may be known how soon the debt will be satisfied. By statute 33 Hen. VIII., c. 39, all obligations made to the Crown shall have the same force, and consequently the same remedy to recover them as a statute staple, and hence the process of extent is chiefly confined to executions issued by the Crown.

"In this manner" (to use once more the words of the learned commentator whom I have so often quoted already) "are the several remedies given by the English law for all sorts of injuries, either real or personal, administered by the several courts of justice and their respective officers. In the course, therefore, of the present volume we have, first, seen and considered the nature of remedies, by the mere

(y) Price v. Varney, 3 B. & C. 733.

" act of the parties, or the mere operation of law, without any suit in
 " courts. We have next taken a view of remedies by suit or action in
 " courts, and therein have contemplated, first, the nature and species of
 " courts instituted for the redress of injuries in general. * * * * *
 " We afterwards proceeded to consider the nature and distribution of
 " wrongs and injuries affecting every species of personal and real rights,
 " with the respective remedies by suit, which the law of the land has
 " afforded for every possible injury. And, lastly, we have deduced and
 " pointed out the method and progress of obtaining such remedies in the
 " courts of justice : proceeding from the first general complaint or *ori-*
 " *ginal* writ ; through all the stages of *process*, to compel the defendant's
 " appearance : and of *pleading*, or formal allegation on the one side, and
 " excuse or denial on the other ; with the examination of the validity of
 " such complaint or excuse, upon *demurrer* ; or the truth of the facts
 " alleged and denied upon *issue* joined, and its several *trials* ; to the
 " *judgment* or sentence of the law, with respect to the nature and amount
 " of the redress to be specifically given ; till, after considering the sus-
 " pension of that judgment by proceedings *in the nature of
 " [*341] *appeals*, we have arrived at its final *execution*, which puts the
 " party in specific possession of his right by the intervention of minis-
 " terial officers, or else gives him an ample satisfaction either by equiva-
 " lent damages or by the confinement of his body who is guilty of the
 " injury complained of."

INDEX.

The pages referred to are those within brackets [].

A.

Abatement of actions, 328.
 — of nuisances, 4.
 — pleas in, 217.
 — replication to, 242.
 Abduction of wife, 64.
 — of child, 65.
 Abroad, service of summons, 169.
 Absolute rights of persons, 56.
 Accord, remedy by means of, 5.
 — and satisfaction, plea of, 5, 6.
 Account, action of, 151.
 — stated, assumpsit on, 126.
 Action, forms of, 151.
 — joinder of, 211.
 — notice of, 154.
 Adultery, remedy for, 64.
 Admission of documents, 270.
 Affidavits, commissioners for taking, 39.
 — general form and requisites of, 136, 137.
 — of service of writs, 179.
 — of truth of plea in abatement, 221, 223.
 — to obtain costs of the day, 265.
 — of admission of documents, 272.
 — of plea puis darrien continuance, 279.
 Amendment of proceedings, 29.
 — of writs of summons, 160, 173.
 — of pleadings, 198.
 — after plea in abatement, 220, 221, 223.
 — after demurrer, 255, 256.
 — of the record, 280.
 Ancient lights, remedy for stopping, by removal of obstruction, 4.
 Animals, injuries occasioned by, 58.

Annuities, summary jurisdiction of courts over, 27.
 Annuity, action of, 151.
 Appearance of the defendant, 188.
 — by attorney or in person, 13, 189.
 — in ejectment, 74.
 — judgment for default of, 165, 182.
 — on affidavit of merits, 183.
 — to writ of revivor, 327.
 Appellate Courts, 40.
 — Jurisdiction, of the House of Lords, 19, 23, 42.
 — of the courts of common law, 26.
 Arrest of defendant on mesne process, 145.
 Arrest of judgment, 290.
 Arbitration, redress by means of, 6.
 — submission to, when may be made a rule of court, 6.
 — summary jurisdiction of superior courts in, 27.
 — reference of a cause to, 284.
 Arbitrators, who are, 6.
 Argumentative pleadings, 203.
 Assault, right of action for, 10, 57.
 Assize, courts of, 43.
 — when holden, 133.
 Attachment to enforce, an award, 6, 7.
 — rules of court, 139.
 Assumpsit, action of, 119, 151.
 Assignment of error, 316.
 Attorneys, their powers, duties and privileges, 13.
 — fined for delivering false plea, 37.
 Audita querelâ, 307.
 Aula regia, 17.

Auxiliary tribunals, 43.
 Avowry in replevin, 111.
 Award, what is an, 6.
 — when and how set aside, 7.
 — may be pleaded in bar, 7.

B.

Bail bonds summary jurisdiction of
 courts over, 27.
 — nature of, 149.
 Bail of defendant, on arrest on mesne
 process, 146, 148.
 — justifying, 150.
 Bail-piece, 150.
 Bail in error, 314.
 Banco, sittings in, 133.
 Barristers, definition of, 14.
 Battery injury to person by, 57.
 Beating wife, remedy of husband for, 56.
 Bill of exceptions, 282, 311.
 Borough Courts, 44.
 Briefs, preparing for trial, 268.
 British subject abroad, service of sum-
 mons upon, 169.

C.

Capias, writ of, 143.
 — ad satisfaciendum, 331.
 Cassetur breve, entry of, 225.
 Cattle, right to retake, 3.
 — action for trespass by, 10.
 — impounded, 107, 108.
 Certiorari, removal of cases by, into
 the Court of Common Pleas, 21, 26.
 — into the Court of Queen's Bench,
 22, 26.
 — into the Court, of Exchequer,
 25, 26.
 — removal of replevin suits from
 the new county courts, 110.
 Certainty in pleading, 201, 205.
 Certificate, trial by, 257.
 — for costs, 287, 288, 289.
 — for execution, 288.
 Challenge of the jury, 276.
 Chancery, Court of, 19 (a).
 — cases sent from, 26.
 Child, right to protect parent, and vice
 versa, 2.
 — remedy of parent for injuries
 to, 65.
 Choses in action, 98, 99.
 Claim of cognizances, 216.
 Claimant in ejectment, proceedings by,
 71.
 Cognizance, in replevin, 111.
 — claim of, in pleading, 216.
 Cognovit, irregularly obtained, will be
 set aside, 38.

Commencement of a declaration, 208.
 Common, injuries by waste to right of,
 93.
 — disturbance of, 96.
 Common Law Procedure Act, 1852, 130.
 Common Pleas, Court of, 18.
 Concurrent writs of summons, 161.
 Confession of defendant in ejectment,
 77.
 — of error, 316.
 Confession and avoidance, pleas in,
 226, 234.
 Consequential injuries, 58.
 Consolidation of actions, 38, 215.
 Continuance, notice of, 263.
 Contracts, express, 116.
 — implied, 121.
 — actions on, 151.
 Corporations, informations in the na-
 ture of a quo warranto to officers,
 &c. of, 53.
 — mandamus to, 54.
 Costs where damages, under 40s., 89.
 — in actions on judgments, 122.
 — of rules and motions, 139.
 — of applications to judge at
 chambers, 140.
 — indorsement of, on writ of sum-
 mons, 160, 166.
 — security for, 214.
 — on demurrer, 255.
 — where parties amend, 256.
 — of the day, 265.
 — of special jury, 275.
 — certificate for, 287, 288.
 — double, 288.
 — of rule, for new trial, 299.
 — taxation of, 303.
 — interlocutory, 304.
 — final, 304.
 — in error, 315, 317.
 Countermand of notice of trial, 264.
 County Courts, appeal from, to the
 superior courts, 26, note (c).
 — removal of replevin suits from,
 110.
 Counts, when several may be inserted
 in a declaration, 209, 210.
 Several pleas to, 227, 228.
 Courts of law, definition of, 11.
 Courts of law, their nature and inci-
 dents in general, 11.
 — superior, of common law, 17.
 — of Chancery, 19, note (a).
 — of Nisi Prius, 43.
 — injuries flowing from, 47.
 Covenant, action of, 118, 151.
 Crimes, what are, 1.
 — jurisdiction of Court of Queen's
 Bench over, 26.
 Crown, injuries by and to the, 50.

Customary services, injury by subtraction of, 94.

D.

Damage *faisant*, right to distrain cattle, 4.

— where distress may be made, 105.

Damages, under 40*s.*, effect of, on costs, 89.

— for injuries to personal property, 116.

— inquiry of, by the master, 186.

Death of parties, how suggested, 328, 329.

Debt, information of, 52, 53.

— action of, 116, 151.

Declaration, essentials of, in pleading, 205.

Default, judgment by, 35, 180.

— in ejectment, 73.

Demand of declaration, 211.

Demurrer in pleading, 251.

— when parties may plead and demur together, 229.

— to evidence, 281.

Departure, in pleading, 248.

Detinue, remedy by action of, 10, 153.

Disability of parties, pleas of the, 218.

Discharge of the jury, 284.

Discontinuance by claimant in ejectment, 77.

Distress, redress by means of, 4, 94, 101.

— for what injuries may be taken, 101.

— what things may be distrained, 103.

— manner of taking, disposing of, and avoiding, 105.

Distringas, former proceedings by, 167.

Disturbance, injuries to real property by, 95.

Documents, admission and production of, on trial, 270, 272.

— stamping, 272.

Dower, remedy for, 86.

— action of, 150.

Double costs, 289.

Duplicity in pleading, 202.

E.

Ejectment, action of, 69.

Elegit, writ of, 338.

Entry on lands, redress by, 3, 68.

Equitable jurisdiction of the Superior Courts of Common Law, 29.

Errors, amendment of, in proceedings, 29.

Error, proceedings in, 308, 312.

— in fact, 308.

— in law, 310.

— in ejectment, 83.

— assignment of, 309.

Estovers, injuries to common of, 93.

Evidence, new trial when verdict against, 297.

Exchequer Chamber, appellate jurisdiction of, 22, 23, 41.

— Court of, 24.

Exceptions, bill of, 282, 311.

Execution in general, 318.

— on writ of inquiry and writ of trial, 45.

— in ejectment, 82.

— certificate for speedy, 288.

— to stay, 288.

— notwithstanding error, 313.

Extent, 339.

F.

False Imprisonment, injury by, and remedy for, 62.

Fees, Sheriffs, 40.

Fieri facias, writ of, 333.

Final judgment, 45.

Foreigner, writ of summons against, 171.

Forms of Action, joinder of, 211.

Forms of Pleadings, 203.

Franchise, disturbance of, 95.

Frauds, statute of, 120.

G.

Goods, recaption or reprisal of, 3.

— assumpsit for, bargained and sold, 124.

— sold and delivered, 125.

General Issue, plea of, 230.

Guardian, remedy of, for injuries to ward, 66.

H.

Habeas Corpus, jurisdiction of superior courts, by means of writ of, 27, 28.

— remedy by, for false imprisonment, 63.

Health, injuries affecting, 60.

Heriots, seizing of, as a means of redress, 4.

— may be recovered without seizure, 10, 11.

Highway, removal of obstructions to, 4.

Horse, right to retake, 3.

House of Lords, appellate jurisdiction of, 19.

Husband, right of, to protect wife and children, 2.

Husband, injuries to, remedy for, 64.

I.

Idiots, cannot in general appear by attorney, 13.
 Imprisonment, what amounts to an, 62.
 — false, remedy for, 63.
 Indorsements on writ of summons, 169, 164.
 — of service of writ, 179.
 Infants, cannot appear by attorney, 13.
 — statute of limitations as to, 153.
 Inferior Courts, control over by Court of Queen's Bench, 22, 23, 26.
 — writ of procedendo to, 49.
 Information, on behalf of the Crown, 52.
 — in the nature of a quo warranto, 53.
 Injuries cognizable in the superior courts of common law, 47.
 — flowing from courts of justice, 47.
 — to which the Crown is a party, 50.
 — affecting the rights of persons, 54.
 — affecting personal security, 56.
 — to personal liberty, 62.
 — to a husband, 64.
 — parent, 65.
 — guardian or ward, 66.
 — master or servant, 66.
 — affecting the right to real property, 67.
 — ouster, 67.
 — trespass, 86.
 — nuisance, 89.
 — waste, 92.
 — subtraction, 94.
 — disturbance, 95.
 — affecting the right to personal property, 97.
 — in possession, 99.
 — in action, 116.
 Inquest of office, 51.
 Inquiry, writ of, 45, 184.
 — of damages before the master, 186.
 Inspection of documents, 215.
 Interpleader Act, summary jurisdiction of courts under, 28.
 — claims on execution, 335.
 Interlocutory Judgment, 45.
 Intrusion, information of, 52.
 Irregularity, power of courts to set aside proceedings for, 35.
 — in service of writs, 178.
 — in notice of trial, 263.
 Issue, how raised, 251.
 — how made up, 260.
 — in ejectment, 78.

J.

Jeofails, statutes of, 31.
 Joinder in error, 314.
 Judges of the Courts, 38.
 — assize, 43.
 — power of, at chambers, 139, 140.
 — privilege of, from arrest, 148.
 — misdirection of, a ground for new trial, 296.
 Judgment, after verdict, 300.
 — signing, 303.
 Judgment, setting aside, for irregularity, 35.
 — when obtained by inadvertence, 37.
 — interlocutory and final, 45, 181, 301.
 — in ejectment, 81.
 — by default, 35, 165, 180.
 — by nil dicit, 184.
 — for want of a plea, 241.
 — arrest of, 290.
 — non obstante veredicto, 292.
 — proceedings after, 305.
 — in error, 315, 317.
 — revival of, 327.
 Judgments, actions upon, 121, 122.
 Jurisdiction of Court of Common Pleas, 21, 26.
 — Queen's Bench, 22, 26.
 — Exchequer, 24, 25, 26.
 — of the superior courts, ordinary, 26.
 — summary, 27.
 — equitable, 29.
 — writ, where defendant is within, 157.
 — where residing out of, 167, 169.
 — pleas to the, 217.
 Jury, how summoned, 272.
 — special, 173.
 — challenging, 276.
 — discharge of, 284.
 — misbehaviour of, 297.
 Juror, withdrawal of a, 283.

K.

Keeper of Queen's Prison, 39.
 King, injuries by, and to the, 50.

L.

Laches, effect of, in proceedings, 37, 38.
 Landlord, ejectment by, 85.
 Lands, right of re-entry upon, 3, 68.
 Levavi facias, writ of, 337.

Libel, injury to reputation by, 61.
 Life, injuries affecting, 56.
 Light, removal of obstruction to, 4.
 — nuisance by obstruction to, 91.
 Limitations, statute of, as to entry on
 lands, 68.
 — as to personal actions, 153.
 — avoidance of, by renewal of
 writs, 162.
 Long vacation, proceedings during the,
 134.

M.

Malicious prosecution, remedy for, 62.
 Mandamus, writ of, by Court of Queen's
 Bench, 22.
 — delay of justice remedied by,
 47.
 — to corporations, 54.
 Married woman cannot appear by at-
 torney, 13.
 Marshals of the courts, 39.
 Master and servant, 66.
 Masters of the courts, 39.
 — conduct how controlled, 35.
 Members of Parliament, privilege of,
 from arrest, 147.
 Meane process, 143.
 — arrest upon, 145.
 — profits, trespass for, 84.
 Mixed actions, 55.
 Misbehaviour of party or jury, new
 trial by reason of, 297.
 Mischievous animals, injuries by, 58.
 Misdirection of judge, 296.
 Misjoinder of parties in pleading, 224.
 Money had and received, action for,
 125.
 — paid, action for, 126.
 Monstrans de droit, 51.
 Mortgages, summary jurisdiction of
 courts in reference to, 28.
 Mortgagee, admission of, to defend in
 ejectment, 75.
 Motion to the court, definition of, 135.
 — course of proceedings on, 138.

N.

Negligent driving, 58.
 New assignment in pleading, 248.
 Newspaper, service of writ upon
 printer, &c., of, 177.
 New trial, motion for, 295.
 Nil dicit, judgment by, 184.
 Nisi Prius, courts of, 43.
 Nolle prosequi, 246.
 Non assumpsit, plea of, 230.
 Non detinet, plea of, 231.
 Non est factum, plea of, 231.

Non cepit, plea of, in replevin, 112.
 Nonjoinder, pleas of, 219, 222.
 Non pros, judgment of, 35, 212.
 Nonsuit, 281, 282.
 — pursuant to leave reserved,
 294.
 Not guilty, plea of, 232, 233.
 Notice to defend in ejectment, 76.
 — of trial, 261, 296.
 — in ejectment, 79, 80.
 — to try, 266.
 — service of, 141.
 — of action, 154.
 — to plead, 213.
 — to reply, 246.
 — of striking out similiter, 244.
 — to admit documents, 270.
 — to produce, 272.
 — of trial by special jury, 274.
 — of error, 313.
 Nuisance, abatement of, 4.
 — public and private, 89.
 — affecting corporeal heredita-
 ments, 90.
 — incorporeal hereditaments, 91.
 — remedy for, 91, 92.
 Nunquam indebitus, plea of, 231, 232.

O.

Officers of the courts, 39.
 Orders of judge at chambers, 139.
 Ordinary jurisdiction of the superior
 courts, 26.
 Original writ in actions, 131.
 — process, 143.
 Ouster, injuries to real property by, 67.
 Outlawry, former proceedings to obtain
 judgment of, 168.

P.

Parent and child, mutual right of pro-
 tection of, 2.
 — remedy for injuries to, 65.
 Particulars of demand, 212.
 Patent, scire facias to repeal, 52.
 Patronage, disturbance of, 97.
 Pauper plaintiff, not allowed to de-
 fraud attorney of costs, 36.
 Payment into court, 236, 245.
 Peers, appellate, jurisdiction of, 42.
 — privilege of, from arrest, 147.
 Personal actions, 55, 151.
 Personal property, injuries affecting,
 97.
 Perverse verdict, 297.
 Petition de droit, 51.
 Pleas, to actions generally, 213.
 — setting aside, when false or frivo-
 lous, 36.

Pleas, when must be delivered, 213.
 — kinds of, 217, 218.
 — in abatement, 217.
 — in bar, 226.
 — to the further maintenance of the action, 235.
 — puis darrein continuance, 277.
 Pleadings, in an action, 192.
 — their object, 193.
 — requisites of, 197.
 — striking out and amending, 198, 250.
 — forms of, 203.
 Points raised by demurrer to be stated in the margin, 252, 253.
 — of law reserved at the trial, 281.
 Pound, definition of a, 107.
 Postea, 285.
 Printer of newspaper, service of writ upon,
 Privilege from arrest, 147.
 Private wrongs, definition of, 1.
 — nuisance, what is, 4.
 Procedendo, writ of, 49.
 Process in actions, 143.
 Prochein amy, appearance by, 13.
 Prohibition, writ of, to inferior courts, 22, 25, 26, 49.
 Promissory note, delivery of, in satisfaction of a debt, 5, 6.
 Promises, action for breach of, 119.
 Proviso, trial by, 267.
 Public wrongs, definition of, 1.
 — nuisance, what is, 4.
 Public companies, service of writs upon, 177.
 Publisher, service of writ upon, 177.
 Puis darrein continuance plea, 277.

Q.

Quantum meruit, assumpsit on, 124.
 — valebat, 124.
 Quare impedit, action of, 97, 150.
 Queen's Counsel, 15.
 — Bench, Court of, 22.
 — prison, keeper of, 39.
 Questions without pleadings, statement of, 190.
 Qui tam actions, 123.
 Quo warranto, writ of, to corporations, 22, 53.
 — nature of the writ, 53.
 Quo minus, writ of, 95.

R.

Real actions, 55, 150.
 Real property, injuries affecting, 67.
 Rebutter, in pleading, 247.

Redress, by the mere act of the parties, 2.
 — by the mere operation of law, 8.
 — by suit in courts, 10.
 Reference to arbitration, 6, 284.
 Recaption of goods, &c., 3.
 Record, trial by the, 259.
 — Nisi Prius, how made up, 268.
 — withdrawal of, 276.
 — amendment of, 280.
 Rejoinder, in pleading, 247.
 Relatives, forcible defence of, 2.
 Relative rights, 56.
 Release, plea of, not allowed under certain circumstances, 36.
 Remedies for injuries, 2, 8, 57.
 Remitter, a remedy for private wrongs, 8, 9.
 Renewal of writs, of summons, 161.
 — of execution, 321.
 Rent, distress for non-payment of, 4, 105, 106.
 — customary, subtraction of, 94.
 Repleader, 293.
 Replevin, action of, 100, 109, 153.
 — bonds, summary jurisdiction of courts in actions on, 27.
 Replication, rules of pleading respecting, 241.
 Reprisal of goods, &c., 3.
 Reputation, injuries affecting, 60.
 Reservation of points at trial, 281, 282.
 Retainer, remedy for private wrongs by means of, 8.
 Return of writs, 132.
 Revising barristers, appeal from, to Court of Common Pleas, 21.
 Revival of judgments, 322.
 Revivor, action of, 152.
 Revivor, proceedings by, in ejectment, 83.
 — of judgment by suggestion, 324, 326.
 Revenue, jurisdiction of the Court of Exchequer in matters relating to the, 28, 29.
 Right of dower, 150.
 Rights of persons, injuries affecting the, 54.
 Rules of court, 135, 138.
 — enforcement of, 139.
 — service of, 141.
 Rule Nisi, 135, 136, 138.
 — absolute, 138.

S.

Satisfaction of judgment, 305.
 — entry of, 306.

- Scire facias, to repeal letters patent, 52.
 — against bail and members of a company, 152.
 Security for costs, 214.
 Seizing of heriots, as a means of redress, 4.
 Seduction, action for, 66.
 Self-defence, redress by means of, 2.
 Serjeants at law, 14, 15.
 Servant, remedy of master for injuries to, 66.
 Service of writs, 174.
 — where defendants within the jurisdiction, 175.
 — on defendants abroad, 178.
 — irregularity in, 178.
 — indorsement of, on writs, 179.
 — affidavit of, 180.
 — in ejectment, 71.
 — of rules, notices, &c. 141.
 Sheriff, control over, by the superior courts, 35.
 — duties of, 40.
 — fees of, 40.
 — trover by, for goods taken in execution, 99.
 — duty of, to summon jury, 272.
 — notice to, of trial by special jury, 274.
 Sheriff's court, 44.
 Similiter in pleading, 243.
 Slander, injury to reputation by, 60.
 Son assault demesne, plea of, 57.
 Sovereign, injuries by and to the, 50.
 Special verdict, 287.
 — jury, 273, 274.
 — certificate for costs of, 288.
 — case, statement of, 192, 256.
 — in ejectment, 79.
 — argument of, 287.
 — indorsement of writ of summons, 162, 164.
 — paper, setting down of demurrers in, 254.
 Stamps, jurisdiction of the Court of Exchequer over duties, 28.
 Stamping documents, 272.
 Statement of questions without pleadings, 190.
 Statute of Limitations, see "Limitations."
 Striking out pleadings, 198.
 Submission to arbitration, 6.
 — not of itself a good defence, 7.
 Subpœna, service of, on witnesses, 269.
 Subtraction, injury to real property by, 94.
 Suggestion to revive a judgment, 324.
 Suit in courts, redress of injuries by, 10.
 Summing up, on a trial, 285.
 Summary jurisdiction of the superior courts, 27, 35.
 Summons, writ of, 155.
 Summons and order, by judge at chambers, 139.
 Sunday, execution on, void, 63.
 Superior Courts of Common Law, 17.
 — injuries cognizable in, 47.
 — proceedings in, 130.
 Supervision of proceedings, by the courts, 29, 35.
 Surcharging of common, 96.
 Surprise, new trial on the ground of, 298.
 Surrebutter, in pleading, 247.
 Surrejoinder, 247.

 T.
 Taxation of costs, 303.
 Tenant, service of writ of ejectment on, 71, 72.
 — ejectment by landlord against, 85.
 Tenure, disturbance of, 97.
 Terms of the superior courts, origin of, 130, 132.
 Trespass, action of, in general, 86, 152.
 — to real property, 86.
 — costs in actions for, 89.
 — to personal property, 113.
 — on the case, origin of the action of, 59.
 — where it lies, 152.
 — for mesne profits, 84.
 — Threats, injuries by means of, 57.
 Time for pleading, 239.
 Trades, injuries by carrying on offensive, 90.
 Traverse, pleas in, 226.
 Trial of actions, 256, 276.
 — in ejectment, 80.
 — notice of, 79, 80.
 — new, motion for, 295.
 Trover, remedy by action of, 10, 113 152.

 V.
 Vacant possession, service of writ of ejectment in case of, 72.
 Vacation, proceedings in, 134, 240.
 Venue in pleadings, 206.
 — in ejectment, 79.
 — changing, 207.
 Venire de novo, 293.
 Verdict, 285.
 — setting aside, when irregularly obtained, 35.

Verdict, in ejectment, 80.

— proceedings after, 289.

— entry of, pursuant to leave reserved, 294.

— new trial, when unreasonable, 297.

View, how obtained, 275.

W.

Warrant of attorney, setting aside, 38.

Warranty, law of, 128.

Ward, remedy of guardian for injuries to, 66.

Waste, injuries by, 92.

— remedy for, 94.

Watercourse, abstracting, diverting, or polluting, 91.

Ways, disturbance of, 96.

Wife, right of husband to protect, 2.

— remedy of husband for injuries to, 64.

Withdrawal of the record, 276.

— of a juror, 283.

Witnesses, trial by, 260.

— subpoenaing for trial, 269.

— perjury of, a ground for new trial, 298.

Wittenagemote, the Saxon court of justice, 17.

Words, action for, 60.

Writ of attachment, 143.

— of inquiry, 45, 184.

— of execution, 319, 330.

— of trial, 45.

— of summons, 155.

— where the defendant is within the jurisdiction, 157.

— of attachment where out of jurisdiction, 167.

— of mandamus, 47.

— of pone, 143.

— of procedendo, 49.

— of restitution, 317.

— of revivor, 326.

— of prohibition, 49.

— of protection, 148.

— of ejectment, 70.

— of execution in ejectment, 82.

— of capias, 143, 146.

— of distringas, 167.

Writ, original, in actions, 131.

Wrongs, private and public, definition of, 1.

CRIMINAL PROCESS:

OR,

A VIEW OF THE WHOLE PROCEEDINGS TAKEN

IN

CRIMINAL PROSECUTIONS,

FROM

ARREST TO JUDGMENT AND EXECUTION:

INTENDED AS AN INTRODUCTION TO

THE STUDY AND PRACTICE OF CROWN LAW.

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TO RICHARD BETHELL, ESQ.,

**FOR MANY YEARS MEMBER OF PARLIAMENT FOR THE EASTERN DIVISION OF YORKSHIRE,
AND UPWARDS OF FORTY YEARS CHAIRMAN OF THE EAST RIDING QUARTER
SESSIONS, THIS LITTLE BOOK ON CRIMINAL LAW IS
RESPECTFULLY DEDICATED BY**

THE AUTHOR.

CONTENTS.

The pages referred to are those between brackets []

CHAPTER I.

Of Crimes and their Division, Treasons, Felonies, and Misdemeanors 1

CHAPTER II.

The Prosecutor—His Rights, Duties, and Obligations . . . 3

CHAPTER III.

The Arrest of Criminals 4

CHAPTER IV.

Of the Examinations before Magistrates 9

CHAPTER V.

Of the Writ of Habeas Corpus 18

CHAPTER VI.

Of the Courts of Criminal Jurisdiction 19

CHAPTER VII.

Of Principals and Accessories, and Definitions of Offences . . . 21

CHAPTER VIII.

Of Indictments 25

CHAPTER IX.

Of the Grand Jury, and the Presentment and Finding of the Bill . . 32

CHAPTER X.

Of the Caption of the Indictment 36
MARCH, 1854.—17

CHAPTER XI.	
Of the Removal of Indictments by Certiorari	38
CHAPTER XII.	
Of the arraignment of the Prisoner	40
CHAPTER XIII.	
Pleadings upon Indictments	41
CHAPTER XIV.	
Of the Jury and Proceedings on Trial	44
CHAPTER XV.	
Of the Trial and Evidence	49
CHAPTER XVI.	
On Evidence	56
CHAPTER XVII.	
On the Verdict	65
CHAPTER XVIII.	
On the Proceedings between Verdict and Judgment	71
CHAPTER XIX.	
Of the Judgment	73
CHAPTER XX.	
Of Writ of Error	75
CHAPTER XXI.	
Of Record of Conviction and Judgment for Murder	76
CHAPTER XXII.	
Of Reprieves and Pardons	81
CHAPTER XXIII.	
Of Criminal Informations	83
CHAPTER XXIV.	
Of Court of Criminal Appeal	88

CRIMINAL LAW.

CHAPTER I.

OF CRIMES AND THEIR DIVISION.

THE design of the present work is to present the reader with the various steps which are taken in a criminal prosecution. And it may be as well, at the outset, to say something of crimes in general. All crimes, according to the law of England, are divided into *treasons*, *felonies*, and *misdemeanors*. The offence of treason, at common law, was somewhat indeterminate. The statute 25 Edw. III., c. 2, confirmed by subsequent statutes, determined what offences only for the future should be considered treason. Under this statute, the offence consists of six branches:—

1. When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir.

2. If a man do violate the king's companion, or the king's eldest daughter unmarried.

3. If a man do levy war against our lord the king in his realm.

4. If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere.

*5. If a man counterfeit the king's great or privy seal.

6. If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. [*2]

FELONY, in the general acceptance of our English law, comprises every species of crime which occasioned at common law, the forfeiture of lands and goods. Sir Edward Coke says, that treason was anciently comprised under the name of *felony*: and in the statute 25 Edw. III., c. 2, speaking of some crimes, we find the following words:—"Whether they be treason or other felony." All treasons are therefore felonies though all felonies are not treasons. Learned but fanciful writers have given many derivations of the word felony. I think Sir Henry Spellman's is the most probable one. Felon, according to him, is derived from two northern words, namely, *fee*, which signifies fief; and *lon*,

which signifies price or value. Felony is, therefore, the same as "*pretium feudi*"—the consideration for which a man gives up his fief. These derivations are more amusing than instructive.

MISDEMEANOR is a term generally used in contradistinction to felony, and comprehends all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, &c.

[*8]

*CHAPTER II.

THE PROSECUTOR.

THE first question to be considered upon the commission of an offence is, by whom is the offender to be brought to justice. Though every man is entitled to prefer an accusation against any one suspected of crime, criminal prosecutions for the most part are instituted in the name of the crown; and persons entitled to prefer accusations are bound by the strongest obligations both of law and reason, to do so; and those obligations are, in many cases, enforced by the law itself. Thus, in cases of treason and felony, a person knowingly concealing the crime is guilty of what is called a misprision of the crime. In the case of treason, he may be punished by the forfeiture of his goods, the loss of all profits of his lands during life, and imprisonment of his person for life. If a public officer conceal a felony, he is punishable by fine and imprisonment for a year and a day; and any person other than an officer, for the same offence, is punishable by fine and imprisonment in the discretion of the judges. Even in cases of misdemeanor, if the crime be of a public character, it is illegal to receive a consideration for suppressing a prosecution; and in a recent case in the Queen's Bench, it is questionable whether an arrangement for a compromise can be made even *with the consent [*4] of the court. Magistrates have power, in order to compel persons to perform the duty imposed on them by law to prosecute, to bind them over to prosecute and give evidence, and, upon refusal, to commit them to prison. The law also holds out many inducements to persons to prosecute, and throws around a prosecutor every fair and reasonable protection, insomuch that he cannot even be sued for wrongly indicting a person, unless he has been actuated by malice, and the proceedings were destitute of any reasonable foundation.

CHAPTER III.

THE ARREST OF CRIMINALS.

WE shall now shortly consider the law relative to arrest on a criminal charge before indictment. In every case of treason, felony, or

actual breach of the peace, a person may be arrested on suspicion before any indictment is preferred against him. Formerly, grave doubts existed as to whether a person could be arrested before a bill was found. The difficulty seems to have arisen from the wording of Magna Charta, which enacts that, "No one shall be taken or imprisoned but by the lawful judgment of his peers, or by the law of the land." An early exception was taken to the case of where a thief was taken in the *manicour*—that is, with the stolen goods actually in his possession. Even *in [*5] the case of misdemeanors, there are certain acts of parliament which authorise a justice to issue his warrant, as in the case of keeping a disorderly house. In every case of treason and felony, and actual breach of the peace, the offender may be apprehended without warrant, if such a crime has actually been committed by some one. The arrest may take place in the night as well as day, and on Sundays, as on other days,—the statute of 29 Charles II., s. 6, making an exception in treasons, felonies, and breaches of the peace. It may also be made in any place, so that even a clergyman, upon a criminal charge, whilst in the performance of divine service, may be arrested. Any private person present when a felony is committed, is enjoined by law to arrest the offender. He is also bound to assist an officer requiring his aid in the apprehension of a felon. If a felony has been actually committed, a private person may direct an officer to arrest the person he supposes to be guilty. If the offence be committed in the presence of another, he may justify breaking open doors in pursuit of the felon; but no private person can justify breaking open doors in apprehending another upon the mere suspicion of the commission of a felony. Constables, *virtute officii*, without warrant, for treason, felony, breach of the peace, and certain misdemeanors less than felony, may arrest another. A constable may also arrest one upon the bare information of others, without any positive knowledge of the circumstances upon which the suspicion is grounded. A *constable may also break open doors to take a felon who may [*6] be in his own house, provided that he has given notice that he is a constable, and has been refused admission. Justices of the peace may arrest on the commission of a felony, or a breach of the peace in their presence, or by issuing a warrant on the evidence and complaint of another. Sheriffs are enjoined to arrest felons, and all persons are required to assist them. A coroner, as a conservator of the peace, in relation to all felonies, may arrest, or cause another to arrest, a felon. The secretary of state may also issue his warrant to apprehend persons suspected of state offences. He may also commit without oath. A warrant may be granted, in extraordinary cases, by the privy council, or secretaries of state, by the speaker of the House of Commons or Lords, by justices of gaol delivery, oyer and terminer, justices at sessions, or by a judge of the Court of Queen's Bench. By 11 & 12 Vict. c. 42, commonly called *Jervis' Acts*, it is enacted, by s. 1, that in all cases where a charge or complaint shall be made before any one or more of her Majesty's justices of the peace, that any person has committed, or is suspected to have committed, any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever within the limits of the

jurisdiction of such justice or justices of the peace; or that any person guilty, or suspected to be guilty, of having committed any such crime or offence elsewhere out of the jurisdiction of such justice or justices, is [*7] residing, or being, or is suspected *to reside, or be within the limits of the jurisdiction of such justice or justices, then and in every such case, if the person so charged or complained against shall not then be in custody, it shall be lawful for such justice or justices of the peace to issue his or their warrant to apprehend such person. In some cases the party may be first summoned, and if the summons be not obeyed, a warrant may issue. The following are the forms, of such summons, &c. :—

Information and Complaint for an indictable Offence.

 } The information and complaint of C. D. of —, [yeoman],
to wit. } taken this — day of —, in the year of our Lord 185—,
before the undersigned, [one] of her Majesty's justices of the peace in
and for the said [county] of —, who saith that [&c. stating the of-
fence].

Sworn before [me], the day and year first above-mentioned, at —.

Warrant to apprehend a Person charged with an indictable Offence.

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas A. B. of —, [labourer], hath this day been charged upon oath before the undersigned, [one] of her Majesty's justices of the peace in and for the said county of —, for that he on — at —, did [&c. stating shortly the offence]: These are therefore to command you, in her Majesty's name, forthwith to apprehend the said A. B. and to bring him before [me], or some other of her Majesty's justices of the peace in and for the said [county], to answer unto the said charge, and to be further dealt with according to law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid. J. S. (L. S.)

[*8] **Summons to a Person charged with an indictable Offence.*

To A. B. of —, [labourer].

Whereas you have this day been charged before the undersigned, [one] of her Majesty's justices of the peace in and for the said [county] of —, for that you, on —, at —, [&c. stating shortly the offence]: These are therefore to command you, in her Majesty's name, to be and appear before me on — at — o'clock in the forenoon at —, or before such other justice or justices of the peace for the same [county] as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the county aforesaid. J. S. (L. S.)

Warrant where the Summons is disobeyed.

To the constable of —, and to all other peace officers in the said [county] of —.

Whereas on the — last past *A. B.* of —, [labourer,] was charged before the undersigned, [one] of her Majesty's justices of the peace in and for the said [county] of —, for that [&c. as in the summons]: And whereas [I] then issued [my] summons to the said *A. B.* commanding him, in her Majesty's name, to be and appear before [me] on — at — o'clock in the forenoon at —, or before such other justice or justices of the peace for the same [county] as might then be there, to answer to the said charge, and to be further dealt with according to law: And whereas the said *A. B.* hath neglected to be or appear at the time and place appointed in and by the said summons, although it hath now been proved to me upon oath that the said summons was duly served upon the said *A. B.*: These are therefore to command you, in her Majesty's name, forthwith to apprehend the said *A. B.*, and to bring him before me, or some other of her Majesty's justices of the peace in and for the said [county], to answer to the said charge, and to be further dealt with according to law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [county] aforesaid. *J. S.* (L. s.)

*When the officer has made his arrest, according to the import of the warrant, he is, as soon as possible, to bring the offender to [*9] the gaol, or before the justice. If a prisoner after arrest has escaped, the officer may follow him and retake him, wherever he find him, in the same or a different county. A rescue is a forcible setting at liberty against law of one arrested. The mere prevention of the arrest of one who has committed a felony is only a misdemeanor. But if an offender be taken and rescued, then, if the arrest were for felony, the rescuer is a felon; if for treason, a traitor.

By 22 Geo. III., c. 58, s. 2, it is made lawful for any one justice of the peace, upon complaint made before him upon oath that there is reason to suspect that stolen goods are knowingly concealed in any dwelling-house or other place, by warrant under his hand and seal, to cause every such place to be searched in the *day time*.

CHAPTER IV.

OF THE EXAMINATIONS.

WITHIN a reasonable time after the arrest of an offender, it is the duty of the officer to bring the accused before the magistrate to be examined; and after investigation, to be committed, bailed, or discharged, as the magistrate may think right. The examinations of the prisoner and the

[*10] witnesses were principally regulated by statutes 1 & 2 P. & M. c. 13, s. 4, and 2 & 3 P. & M. c. 10. The recent statute of 11 & 12 Vict. c. 42, has made some very valuable alterations. By the former of these statutes, the magistrates have authority to bring before them every person who may be a material witness for the prosecution; and, for this purpose, may issue his warrant for such person's attendance. All the witnesses must be examined upon oath. The usual form of such oath is, "You shall true answers make to such questions as shall be demanded of you, so help you God." The examinations must be taken in writing. By s. 17 of 11 & 12 Vict. it is enacted, that the magistrate, before he commits an offender, or admits him to bail, shall take the statement on oath, or affirmation, of those who know the facts and circumstances of the case. The same are to be reduced to writing, to be read over and signed respectively by the witnesses. These examinations are to be taken in the presence of the accused person, who is at liberty to ask any questions produced against him. The following is the form of a witness's deposition:—

Depositions of Witnesses.

to wit. } The examination of *C. D.* of — [farmer] and *E. F.* of — [labourer], taken on [oath] this — day of —, in the year of our Lord —, at —, in the [county] aforesaid, before the undersigned, [one] of her Majesty's justices of the peace for the said [county], in the presence and hearing of *A. B.*, who is charged this day before [me], for that he the said *A. B.* on —, at — [dec. describing the offence as in a warrant of commitment].

This deponent *C. D.* on his [oath] saith as follows [dec., stating the deposition of the witness as nearly as possible in the *words he uses.
[*11] When his deposition is complete, let him sign it.]

And this deponent *E. F.*, upon his oath, saith as follows [dec.]

After the examinations of all the witnesses, on the part of the prosecution, are completed, the magistrate is bound to read, or cause to be read, over the depositions of the witnesses, and to say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say any thing in answer to the charge. You are not obliged to say any thing unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." If the prisoner say any thing, the magistrate must take it down in writing, read it over to him, and then sign it. This statement is kept with the depositions. The magistrate, before the prisoner makes any such statement, must further give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to him, to induce him to make any admission or confession of his guilt. The following is the form of the statement of the accused:—

The Statement of the Accused.

— : *A. B.* stands charged before the undersigned, [one] of her Majesty's justices of the peace, in and for the [county] aforesaid, this — day of — in the year of our Lord — for that he the said *A. B.* on —, at —, [*&c., as in the caption of the depositions*]; and the said charge being read to the said *A. B.*, and the witnesses for the prosecution, *C. D.* and *E. F.*, being severally *examined in his presence, the said *A. B.* is now addressed by me as follows: "Hav- [*12] ing heard the evidence, do you wish to say any thing in answer to the charge? you are not obliged to say any thing, unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" whereupon the said *A. B.* saith as follows:

[*Here state whatever the prisoner may say, and in his very words, as near as possible. Get him to sign it if he will.*]

A. B.

Taken before me at — the day
and year first above mentioned.

J. S.

The place where the examinations are taken is not an open court, as the justice may, if he think fit, order that no person shall have access to it. After the examinations, the magistrate binds over, by recognizance, the prosecutor and witnesses to appear at the next court where the accused is to be tried, then and there to prosecute and to give evidence. If any witness refuse to enter into recognizance, the magistrate may commit him to prison. The following are the forms:—

Recognizance to prosecute or give evidence.

— : Be it remembered, that on the — day of — in the year of our Lord — *C. D.* of — in the township of — in the said county, farmer, [or *C. D.* of No. 2, — street, in the parish of —, in the borough of —, surgeon of which said house he is tenant,] personally came before me, one of her Majesty's justices of the peace for the said county, and acknowledged himself to owe to our sovereign lady the queen the sum of —, of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lady the queen, her heirs and successors, if he the said *C. D.* shall fail in the conditions indorsed.

Taken and acknowledged, the day and year first above mentioned, at —, before me.

J. S.

*Notice of the said Recognizance to be given to the Prosecutor [*18]
and his Witnesses.

} Take notice, that you, *C. D.*, of —, are bound in the sum
to wit. } of — to appear at the next court of [general quarter sessions

of the peace] in and for the county of —, to be holden at —, in the said county, and then and there [prosecute and] give evidence against A. B.; and unless you then appear there, and [prosecute and] give evidence accordingly, the recognizance entered into by you will be forthwith levied on you.

Dated this — day of —, 185—.

J. S.

Commitment of Witness for refusing to enter into the Recognizance.

To the constable of — and to the keeper of the [house of correction] at —, in the said [county] of —.

Whereas A. B. was lately charged before the undersigned, [one] of her Majesty's justices of the peace in and for the said [county] of —, for that [&c., as in the summons to the witness], and it having been made to appear to [me] upon oath that E. F., of —, was likely to give material evidence for the prosecution, [I] duly issued [my summons to the said E. F., requiring him to be and appear] before [me] on —, at —, or before such other justice or justices of the peace as should then be there, to testify what he should know concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before [me] or being brought before [me] by virtue of a warrant in that behalf, to testify as aforesaid, hath been now examined by [me] touching the premises, but being by [me] required to enter into a recognizance conditioned to give evidence against the said A. B. hath now refused so to do: these are therefore to command you the said constable to take the said E. F. and him safely to convey to the [house of correction] at —, in the [county] aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said E. F. into your custody in the said [house of correction], there to imprison and safely keep him *until after the trial of the said A. B. for the offence aforesaid, unless in the meantime such E. F. shall duly enter into such recognizance as aforesaid in the sum of — pounds, before some one justice of the peace for the said [county], conditioned in the usual form to appear at the next court of [oyer and terminer, or general gaol delivery, or general quarter sessions of the peace], to be holden in and for the [county] of —, and there to give evidence before the grand jury upon any bill of indictment which may then and there be preferred against the said A. B. for the offence aforesaid, and to give evidence upon the trial of the said A. B. for the said offence, if a true bill should be found against him for the same.

Given under my hand and seal this — day of —, in the year of our Lord —, at —, in the [county] aforesaid.

Subsequent Order to discharge Witness.

To the keeper of the [house of correction] at —, in the [county] of —.

Whereas by [my] order dated the — day of — [instant], recit-

ing that *A. B.* was lately before then charged before [*me*] for a certain offence therein mentioned, and that *E. F.* having appeared before me, and being examined as a witness for the prosecution in that behalf, refused to enter into a recognizance to give evidence against the said *A. B.*, and I therefore thereby committed the said *E. F.* to your custody, and required you safely to keep him until after the trial of the said *A. B.* for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid: And whereas for want of sufficient evidence against the said *A. B.*, the said *A. B.* has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said *E. F.* should be detained longer in your custody: these are therefore to order and direct you the said keeper to discharge the said *E. F.* out of your custody as to the said commitment, and suffer him to go at large.

Given under [*my*] hand and seal, this — day of —, in the year of our Lord —, at —, in the [*county*] aforesaid. *J. S. (L. S.)*

*The recognizances, depositions, &c., are then to be transmitted to the court in which the prisoner is to be tried. The magistrate has the power of remanding the accused for any reasonable time not exceeding eight clear days to the common gaol, house of correction, prison, or other place of security. In all cases of felony, and in certain misdemeanors, the magistrates may take bail at the time of examination; and in all cases where a person charged with an indictable offence is committed to prison to take his trial for the same, it is lawful at any time afterwards, and before the first day of the session at which he is to be tried, for the magistrate who signed the warrant for his commitment to admit him to bail. The following is the form of the recognizance of bail:—

Recognizance of Bail.

Be it remembered, that on the — day of —, in the year of our Lord —, *A. B.*, of —, labourer, *L. M.*, of —, grocer, and *N. O.*, of —, butcher, personally came before [*us*] the undersigned, two of her Majesty's justices of the peace for the said [*county*], and severally acknowledged themselves to owe to our lady the queen the several sums following; (that is to say), the said *A. B.* the sum of —, and the said *L. M.* and *N. O.* the sum of —, each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of our said lady the queen, her heirs and successors, if he the said *A. B.* fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at — before us,

J. S.

J. N.

Condition in ordinary Cases.

The condition of the within written recognizance is such, that whereas

[*16] the said *A. B.* was this day charged before *[us], the justices within mentioned, for that [*&c., as in the warrant*]; if therefore the said *A. B.* will appear at the next court of oyer and terminer and general gaol delivery [or court of general quarter sessions of the peace] to be holden in and for the county of —, and there surrender himself into the custody of the keeper of the [*common gaol*] there, and plead to such indictment as may be found against him by the grand jury, for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave,—then the said recognizance to be void, or else to stand in full force and virtue.

Condition where the Defendant is entitled to a Traverse.

The condition of the within written recognizance is such, that whereas the said *A. B.* was this day charged before [*me*], the justice within mentioned, for that [*&c., as in the warrant or summons*]; if therefore the said *A. B.* will appear at the next court of general quarter sessions of the peace [or court of oyer and terminer and general gaol delivery] to be holden in and for the county of —, and there plead to such indictment as may be found against him by the grand jury, for or in respect of the charge aforesaid, and shall afterwards at the then next court of general quarter sessions of the peace [or court of oyer and terminer and general gaol delivery] surrender himself into the custody of the keeper of the [*house of correction*] there, and take his trial upon the said indictment, and not depart the said court without leave,—then the said recognizance to be void, or else to stand in full force and virtue.

A warrant of deliverance on bail is given for a prisoner after commitment, signed by the magistrate, and which is an authority to the gaoler to discharge the prisoner. The following is the form of the warrant.

Warrant of Deliverance, on Bail being given for a Prisoner already committed.

To the keeper of the [*house of correction*] at —, in the said [*county*] of —.

*Whereas *A. B.*, late of —, labourer, hath before [*us two*] [*17] of her Majesty's justices of the peace in and for the said county, entered into his own recognizance, and found sufficient sureties for his appearance at the next court of oyer and terminer and general gaol delivery [or court of general quarter sessions of the peace] to be holden in and for the county of —, to answer our sovereign lady the queen, for that [*&c., as in the commitment*], for which he was taken and committed to your said [*house of correction*]: these are therefore to command you, in her said Majesty's name, that if the said *A. B.* do remain in your custody in the said [*house of correction*] for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this — day of —, in the year of our Lord —, at —, in the [*county*] aforesaid.

J. S. (L. s.)
J. N. (L. s.)

When the whole of the evidence on the part of the prosecution has been heard, the magistrate either discharges or commits the prisoner to gaol. The following is the form of the warrant of commitment:—

Warrant of Commitment.

To the constable of — and to the keeper of the [*house of correction*] at —, in the said [*county*] of —.

Whereas *A. B.* was this day charged before me, *J. S.*, one of her Majesty's justices of the peace in and for the said [*county*] of —, on the oath of *C. D.*, of —, *farmer*, and others, for that [*etc., stating shortly the offence*]: these are therefore to command you, the said constable of —, to take the said *A. B.*, and him safely to convey to the [*house of correction*] at — aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [*house of correction*] to receive the said *A. B.* into your custody in the said [*house of correction*], and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this — day of —, in the year of our Lord —, at —, in the [*county*] aforesaid.

J. S. (L. S.)

*CHAPTER V.

[*18]

HABEAS CORPUS.

WHENEVER a person is restrained of his liberty, whether in prison or by a private person, and whether for a criminal or civil cause, he may, by habeas corpus, have his body, and the proceedings under which he is detained, removed to some superior jurisdiction having authority to examine the legality of the commitment, and on the return to the writ, he will be discharged, bailed, or remanded. There are three descriptions of writs of habeas corpus, namely, the habeas corpus ad subjiciendum, the habeas corpus ad deliberandum et recipiendum, and the habeas corpus cum causa. The principal habeas corpus act, 31 Cha. II. c. 2, was passed owing to the delays which arose from sheriffs and other officers having persons in custody, and neglecting to make returns to writs of habeas corpus. The writ is obtained by motion to the court in term, and by application to a judge in vacation. It must be signed by the judge by whom it is granted. The party to whom the writ is directed is bound to return the body within three days if twenty miles, ten days if within a hundred miles, and twenty days for any greater distance. The depositions, in obedience to a certiorari issued from the crown office with the habeas corpus, are returned by the magistrate *who committed, for the [*19] information of the court. Upon the writ being returned, the counsel for the prisoner may move to file the return, and that the prisoner be called into court and the return read; after which the counsel

proceeds to argue the illegality of the commitment. The judges, after argument, either discharge, bail, or remand the prisoner. The writ of habeas corpus ad deliberandum et recipiendum lies to remove a prisoner to take his trial in the county where the offence was committed; the writ of habeas corpus cum causa is issued by the bail of a prisoner on a criminal charge, in order to render him in their own discharge; upon the return an *exoneretur* is entered on the bail-bond.

CHAPTER VI.

OF THE COURTS OF CRIMINAL JURISDICTION.

THE Court of Queen's Bench is the highest court in criminal cases within the realm. Its jurisdiction extends from high treason down to a breach of the peace; and this court may proceed on indictment for any offences removed by *certiorari* from inferior courts.

The commission of General Gaol Delivery is one directed to the judges themselves, the serjeants, queen's counsel, and the clerk of assize and associate. The commission is the same on each circuit. It commands [*20] them, four, three, or two of them, of which number there must be at least one of the *judges and serjeants specified, and authorises them to deliver the gaol at a particular town and the prisoners in it. They are commanded to meet at a particular time and place, and the commission informs them that the sheriff is commanded to bring all prisoners before them. Every description of office is cognisable under this commission.

The commission of *Oyer and Terminer* is one to inquire, hear, and determine into the truth of all treasons, felonies, and misdemeanors therein *specifically* mentioned. The courts held in every county on the circuits, called the assizes, are held before the queen's commissioners, among whom are usually two of the judges. The six circuits of England date back as far as the year 1176. The judges of assize now sit by virtue of five commissions—namely, the Commission of the Peace, the Commission of Oyer and Terminer, the Commission of General Gaol Delivery, the Commission of Assize, and the Commission of Nisi Prius.

There are also the courts of sessions. These sessions are of four kinds—namely, Petty, Special, General, and Quarter Sessions. The General Quarter Sessions of the Peace is a court of record holden before two or more justices, one of whom must be of the quorum. This court, by statute 2 Henry V. c. 4, must be held four times every year, in every English county, and oftener if occasion require. This court, as far as respects its jurisdiction to hear and determine indictments, appears to owe its origin to the statutes 18 Edward III. c. 2, and 34 Edward III. c. 1.

*CHAPTER VII.

[*21]

PRINCIPALS AND ACCESSARIES.

Definition of Offences.

BEFORE we treat of indictments, it may be well to say something of those persons against whom an indictment lies, and then to give shortly a definition of the chief offences which are the subjects of indictments. An indictment lies against those who commit, procure, or assist in the commission of crimes, as well as against those who harbour offenders. All persons, save those exempted by the law itself, are liable to the penalties for disobedience of the law. The following are the exemptions :—

Infants.—Within the age of seven years no infant can be guilty of felony. Between the ages of seven and fourteen an infant is deemed *prima facie* to be *doli incapax* ; but this presumption may be rebutted by evidence of a mischievous discretion : indeed, it is said that an infant aged eight years may be indicted for murder, and hanged. There are instances on record of a child between eight and nine years being executed for arson, and a girl of thirteen years being executed for killing her mistress.

Insane people are not criminally responsible for their acts. Insanity may be divided into three kinds :—

*1. *Dementia naturalis, idiocy or natural fatuity.* According to Lord Coke, an idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals. [*22]

2. *Adventitious insanity, or dementia accidentalis,* which is either partial or total insanity.

3. *Dementia affectata, or acquired madness.* If the primary cause of the phrenzy be involuntary, this species of insanity will excuse the offender equally with the former species of this malady.

If a person be subjected to the power of another, he is not responsible for his acts. Thus, if A. by force take the hand of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but B. is excused. No threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel another to kill C., is a legal excuse. In general, if a felony be committed by a wife in the presence of her husband, she is presumed to have acted under his coercion, and is excused from punishment. This presumption may, however, be rebutted by showing that the wife voluntarily took an active part in the commission of the offence.

A *principal* is either the actual perpetrator of the crime, or a person present, aiding and abetting. In some cases, a man may be a principal without being present, as where poison is laid by a person not present when it is taken ; and, generally, whenever murder is committed in the absence of the murderer, or of any other guilty party, by means pre-

[*23] pared beforehand. A principal in the first degree is the actual perpetrator; a principal in the second degree is a person present, aiding and abetting. The presence must be sufficiently near to give assistance. An accessory is a person not present, but concerned in some manner with the felony, either before or after its commission. *Accessories before the fact* are persons absent at the time of the felony committed, who do yet procure, counsel, command, or abet another to commit a felony. *Accessories after the fact* are persons who, knowing a felony to have been committed by another, receive, relieve, comfort, or assist the felon, whether such felon be principal or accessory before the fact.

We shall now give a short definition of the principal offences known to the English law.

Arson.—This offence consists in the wilful burning of the house or outhouse of another man.

Bigamy is, when a person being married, shall marry any other person during the life of the former husband or wife, whether such second marriage shall have taken place in England or elsewhere.

Burglary (at common law) is the breaking and entering, between the hours of nine at night and six in the morning, into the dwelling-house of another with intent to commit a felony therein.

Conspiracy is the confederacy or agreement of two or more persons to injure an individual, or do any other unlawful act or acts prejudicial to the community, or even to do a lawful act by unlawful means.

[*24] *Embezzlement* is where any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, receives by virtue of such employment any chattel, money, or valuable security for or in the name or on the account of his master, and refuses to account for the same.

False Pretences is where a person by any false pretence obtains from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same.

Forgery may be defined as the false making of an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons.

Homicide is the killing another either innocently or feloniously.

Larceny (or theft) comprises both simple larceny and larceny with aggravation, as robbery. Simple larceny consists in the taking and carrying away of the personal goods of another with intent to deprive the owner of them.

Libel is the malicious publication of any defamatory or contumelious matter against another in print, writing, signs, or pictures.

Manslaughter is the unlawful killing of another without malice either express or implied.

Murder is where a person of sound memory, and of the age of discretion, unlawfully killeth another with malice aforethought, either expressed or implied.

[*25] *Perjury* is the swearing wilfully, corruptly, and falsely, in a matter material to the point in question, the oath being lawfully administered in some judicial proceeding.

Rape is when a man hath carnal knowledge of a woman by force and against her will.

Receiving Stolen Goods is the receiving any money, chattel, or valuable security, knowing the same to have been stolen.

Riot is where three or more actually do an unlawful act of violence with or without a common cause or quarrel, or even do a lawful act in a violent or tumultuous manner.

Robbery is the forcible taking from the person of another of goods or money to any value by violence, or putting him in fear.

Sodomy is having connection with another against the order of nature.

Subornation of Perjury is the procuring another person to commit perjury.

CHAPTER VIII.

INDICTMENTS.

AN indictment is defined to be a written accusation of one or more persons of a crime, presented, upon oath, by a jury of twelve or more men, termed a *Grand Jury*. Until very recently all the rules of pleading with respect to a declaration were applicable to an indictment. By a recent *statute, 14 & 15 Vict. c. 100, the extreme niceties and refined technicalities are abolished. An indictment now is little [*26] more than a simple statement of the offence, and such as good sense and regard for the accused alone would suggest. The first requisite in an indictment is that it should be framed with certainty. It must contain a certain description of the crime, so that a grand jury may not find a bill for one offence and the prisoner be tried for another. The facts of the crime should be stated with as much certainty as the case will permit. Thus, in an indictment for false pretences, it must show what the false pretences were, so that it may be seen whether they are such as come within the statute against false pretences. The court may now, on the trial of any indictment for felony or misdemeanour, amend such variances, provided they are not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial to be had before the same or another jury. These amendments apply to six classes:—

1. The name of any county, riding, division, city, borough, town, corporate, parish, township, or place mentioned or described in the indictment.

2. The name or description of any person or persons, or body politic or corporate, stated to be the owner or owners of any property which forms the subject of any offence charged in the indictment.

3. The name or description of any person or persons, body politic or corporate, alleged to be *injured or damaged, or intended to be injured or damaged, by the commission of the offence charged in [*27] the indictment.

MARCH, 1854.—18

4. The christian name or surname, or both christian name and surname, or other description of any person or persons named or described in the indictment.

5. The name or description of any matter or thing named or described in the indictment.

6. The ownership of any property named or described in the indictment.

There is no power, however, to amend the same identical particular more than once; and no amendment can be made so as to change the character of the offence.

We shall now shortly consider the different parts of an indictment. The venue in the margin expresses the county in which the prisoner is to be put upon his trial. It was necessary formerly, after every material allegation in the body of the indictment, to aver time and place, which was signified by the words "*then and there*," the "*there*" referring to the venue in the margin; but this now is no longer necessary, as by 14 & 15 Vict. sect. 23, c. 100 the venue in the margin is sufficient, except where local description is necessary, as in the case of housebreaking for example. Immediately after the statement of the venue in the margin, the indictment proceeds to show the presentment of the jury upon oath; the words are, "*The Jurors for our Lady the Queen, upon their oath, present.*" The name and addition of the *party indicted should [*28] be inserted in the indictment, although any defects in this respect will not now vitiate an indictment. After the addition, it was usual to state the time when the offence was committed; but now the omission of the statement of time at which the offence was committed, in any case where time is not of the essence of the offence (as in the case of burglary), is immaterial.

The next is the description of the offence, and this ought to be set forth plainly and with certainty, so as not to clog the record, as Mr. Justice Buller observes, with unnecessary matter. The indictment should charge a man with a particular specified offence, and not with being an offender in general. Thus it would not do to charge a man with being a common thief or a common conspirator, or with any other such indistinct accusation; for, if this were allowed, no man could frame a defence to an accusation so vague and general. There are still, however, certain technical terms used in the description of the offence, as the word "*knowingly*," in receiving stolen goods, &c.; the word "*traitorously*," in treason; the word "*burglariously*," in burglary. In the crime of murder, the words "*malice aforethought*;" so in rape, the words "*feloniously ravished*" and "*carnally knew*" are necessary. A formal conclusion against the form of the statute in such case made and provided, and against the peace of our sovereign lady the queen, her crown, and dignity, such as was formerly necessary, will not now, by its omission invalidate an indictment.

[*29] *In cases of felony it is not usual to charge more than one distinct offence, except in instances of embezzlement and larceny, in one indictment. In these excepted cases such power is given by statute, under certain conditions. There is not, however, in point of law,

any objection to the insertion of several distinct felonies of the same degree, though committed at different times. An indictment containing a count for felony and a count for a misdemeanor would be bad for misjoinder. All formal objections for defects on the face of the indictment must now be taken by demurrer or motion, to quash such indictment before the jury shall be sworn, and not afterwards, and the court may amend such defects.

We shall now proceed to give a few forms of indictments as simplified by the present state of the law:—

For Murder.

Yorkshire } The jurors for our lady the Queen, upon their oath, pre-
to wit. } sent, that I. S., on the 1st day of May, in the year of our
Lord, 1852, feloniously, wilfully, and of his malice aforethought did kill
and murder C. D.

For Manslaughter.

Yorkshire } The jurors for our lady the Queen, upon their oath, pre-
to wit. } sent, that A. B., on the 1st day of October, in the year of
our Lord, 1852, feloniously did kill and slay C. D.

For Rape.

Yorkshire } The jurors for our lady the Queen, upon their oath, pre-
to wit. } sent, that A. B., on the *1st of October, in the year
of our Lord, 1852, violently and feloniously did make an assault [*30]
in and upon one C. D., and then violently and against her will feloniously
did ravish and carnally know the said C. D., against the form of
the statute in such case made and provided.

For Forgery and Uttering.

Yorkshire } The jurors for our lady the Queen, upon their oath, pre-
to wit. } sent, that A. B., on the 1st day of October, in the year of
our Lord, 1852, feloniously did forge a certain will, purporting to be the
last will of one George Smith, with intent to defraud, against the form
of the statute in such case made and provided. And the jurors afore-
said, upon their oath aforesaid, do further present, that the said A. B.,
on the day and year aforesaid, feloniously did offer, utter, dispose of, and
put off a certain forged will, purporting to be the last will of one George
Smith, with intent to defraud him the said A. B., at the time he so
offered, uttered, disposed of, and put off the same forged will as afore-
said, then well knowing the same to be forged, against the form of the
statute in such case made and provided.

For Housebreaking.

Yorkshire } The jurors for our lady the Queen, upon their oath, pre-
to wit. } sent, that A. B., on the 1st day of October, in the year of
 our Lord, 1852, at the parish of Keyingham, in the county of York,
 [*81] feloniously did break and enter the dwelling-house *of T. J. O.,
 there situate, and then and there, in the said dwelling-house,
 feloniously did steal, take, and carry away two coats of the value of £5,
 of the goods and chattels of T. J. O., against the form of the statute in
 such case made and provided.

For Receiving Stolen Goods.

Yorkshire } The jurors for our lady the Queen, upon their oath, present,
to wit. } that A. B., on the 1st day of October, in the year of our
 Lord 1852, feloniously did receive one horse, of the goods and chattels
 of C. D., before then feloniously taken, stolen, and driven away; he, the
 said A. B., at the time when he so received the said horse then well
 knowing the same to have been feloniously taken, stolen, and driven
 away, against the form of the statute in such case made and provided.

For Embezzlement as Clerk.

Yorkshire } The jurors for our lady the Queen, upon their oath, present,
to wit. } that A. B., on the 1st day of October, in the year of our
 Lord 1852, being then clerk to C. D., did, by virtue of his said employ-
 ment, and whilst he was so employed as aforesaid, receive and take into
 his possession certain money to a large amount, to wit, to the amount of
 £50, for the said C. D. his master, and then fraudulently and feloniously
 did embezzle the same; and so the jurors aforesaid, upon their oath, do
 [*82] say, that the said A. B., then, in *manner and form aforesaid,
 feloniously did steal, take, and carry away the said money, the
 property of the said C. D. his master, from the said C. D. his master,
 against the form of the statute in such case made and provided.

It will be seen, from the foregoing forms, that an indictment now is
 nothing more than a simple and intelligible statement of the offence
 charged against the prisoner.

 CHAPTER IX.

 OF THE GRAND JURY, AND THE PRESENTMENT AND FINDING OF THE
 BILL.

It will now be necessary to say something of the Grand Jury, and the
 mode and manner of presenting and finding the bill, since in the last

chapter we considered the structure of the indictment itself. That which is presented to the Grand Jury is technically called a *bill*, and when found an *indictment*. The bill is presented to the Grand Jury of the county in which the offence was committed. The Grand Jury must consist of twelve at least, and may contain any greater number, not exceeding twenty-three. Twelve at least of the jury must agree in finding a bill. All persons serving on this jury must be good and lawful men, liege subjects of the queen, and not aliens. Outlaws, even in a civil action, persons *convicted of treason or felony, or any species [*33] of crimes falsi, as conspiracy or perjury, are incapacitated. The prisoner may challenge before the bill is presented any man who is thus disqualified. If he discovers it after the finding of the bill, he may plead it in avoidance and answer over to the felony.

The property qualification of grand jurors is not very clear. It has been disputed whether they need be even freeholders; but it is absolutely necessary at common law that all the Grand Inquest should be inhabitants of the county for which they are sworn to inquire. By 33 Hen. VI. c. 2, grand jurors in the county of Lancaster must have £5 per annum, and, in Yorkshire, by 7 & 8 Wm. III. c. 32, they must possess £80 a year in land, either freehold or copyhold, and are not eligible before they have attained twenty-one years. In practice, as Mr. Justice Blackstone observes, the jurors are usually gentlemen of the best figure in the county. Many persons are exempted from serving for the Grand Jury under the 13 Edw. I., stat. 1, c. 88.

We shall now consider the mode of summoning the Grand Jury. Upon the summons of any sessions of the peace, and in cases of commissions of oyer and terminer, and gaol delivery, there issues a precept, either in the name of the queen or of two or more justices, directed to the sheriff, upon which he is to return twenty-four or more out of the whole county, from whom the Grand Jury is selected. In particular counties the practice somewhat varies. Every summons of jurors is to *be made by the sheriff, his officer, or lawful deputy six days [*34] before the time appointed to serve. The mode of proceeding to swear and charge the Grand Jury is thus:—At the assizes, when the judge comes into court, the crier makes proclamation for keeping silence, whilst the commissions of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery for the county are read by the clerk of arraigns. The sheriff then returns the precepts and writs of Assize and Nisi Prius. The names of the justices of the peace, coroners, constables, &c., are then called over. After this the Grand Jury are called by the crier by their names and additions. The marshal or crier then swears the jury: the foreman by himself; the rest by three at a time. The form of oath to the foreman is as follows:—My Lord, or Sir (as the foreman's title or name may be), you, as foreman of this grand inquest for the body of this county of A., shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the queen's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred, or malice, neither shall you leave any one unrepresented for fear, favour or affection, gain, reward or hope thereof;

but you shall present all things truly, as they come to your knowledge, according to the best of your understanding,—so help you God. The marshal then administers to the rest of the jury the following oath :—

[*35] The same oath your foreman hath taken on his part, you and every of *you shall truly observe on your part,—so help you God.

After they are all sworn, the orier counts them, and makes this proclamation :—“Oyez ! oyez ! oyez ! my lords, the queen’s justices, do strictly charge and command all manner of persons to keep silence whilst her Majesty’s proclamation against profaneness and immorality be openly read, upon pain of imprisonment.” The proclamation is then read, after which the orier makes further proclamation thus :—“Oyez ! oyez ! oyez ! my lords, the queen’s justices, do strictly charge and command all manner of persons to keep silence whilst the charge is given to the Grand Inquest.” The judge then delivers his charge. The following proclamation is then made :—“Oyez ! oyez ! oyez ! all justices of the peace, coroners, stewards of leets and liberties, and other officers that have taken any inquisition or recognizance, let them deliver them into court forthwith, that my lords, the queen’s justices, may proceed thereon ; and all manner of persons bound by recognizance to prefer any bill of indictment against any prisoners in the gaol of this county, or others, let them come forward and prosecute, or they will forfeit their recognizance.”

The Grand Jury having been sworn, charged, and empowered to execute the duties of their office, the bill must be preferred before them. It is previously engrossed on parchment. All the proceedings before the Grand Jury are secret. Witnesses that are material to the finding of an indictment are *compellable to attend by subpoena issuing out of [*36] the Crown Office. The Grand Jury hear the evidence on the part of the prosecution only. After they have heard the evidence they are to decide whether the bill shall be found or rejected. Twelve of them must concur in finding a bill. If they find “a true bill,” it is returned in court with “a true bill” indorsed on it ; and if rejected, “not a true bill.” When the jury have made these endorsements, the clerk of assize asks them if they agree that the court should amend all matter of form, altering no matter of substance.

CHAPTER X.

OF THE CAPTION OF THE INDICTMENT.

THE caption is no part of the indictment ; it is only a copy of the style of the court at which the indictment was found. It is a formal statement describing the court before which the indictment was found. The name of the county must be stated in the margin ; the court where the indictment was found ; the place where the court was held ; the time of taking the indictment ; the names of the justices, their addition and

authority ; the oath and names of jurors, and the conclusion. The following is a form of a caption to an indictment:—

Yorkshire } Be it remembered, that at the sessions of oyer and terminer,
to wit. } of our sovereign lady the queen, holden at the Castle of
 York, in *and for the county of York, on Monday, the—— day [*37]
 of ——, in the fifteenth year of the reign of our sovereign lady
 Victoria, Queen of Great Britain and Ireland, before the Honourable Sir
 Cresswell Cresswell, Knight, one of the justices of our said lady the
 queen, of her Court of Common Pleas, the Hon. Sir William Wight-
 man, knight, one of the justices of our said lady the queen, assign-
 ed to hold pleas before the queen herself, and others their fellows
 justices of our said lady the queen, assigned by letters-patent of our
 said lady the queen, under her great seal of Great Britain and Ire-
 land, to the said Sir Cresswell Cresswell, Knight, Sir William Wight-
 man, and others their fellows justices of our said lady the queen, and to
 any two or more of them directed, of whom one of them, the said Sir
 Cresswell Cresswell, and Sir William Wightman, amongst others in the
 said letters-patent named, our said lady the Queen, willed to be one to
 inquire more fully the truth by the oath of good and lawful men of the
 said county, and by other ways, means, and methods by which they
 should, or might, the better know, as well within liberties as without,
 by whom the truth of the matter might be the better known and inquired
 into of all treasons, misprision of treason, insurrections, rebellions, coun-
 terfeiting, clippings, washing, false coining, and all other falsities of the
 moneys of Great Britain and other dominions whatsoever; and of all
 murders, felonies, manslaughterers, killings, burglaries, rapes of women,
 unlawful meetings and conventicles, unlawful utterings of words,
 *assemblies, misprisings, confederacies, false allegations, tres- [*38]
 passes, riots, routs, retentions, escapes, contempts, falsities, negligencies,
 concealments, maintenances, oppressions, champerties, deceits, and all
 other evil doings, offences, and injuries whatsoever; and also the acces-
 saries of them within the county aforesaid, as well within liberties as
 without, by whomsoever and in what manner soever done, committed, or
 perpetrated; and by whom or to whom, when, how, and after what manner,
 and of all other articles and circumstances concerning the premises and
 every of them, or any of them, in any manner whatsoever; and the said
 treasons, and other the premises, according to the laws and customs of
 England, for this time to hear and determine by the oath of twelve jurors
 (here insert names), good and lawful men, of the county aforesaid, now
 here sworn and charged to inquire for our said lady the queen for the
 body of the said county.

It is presented in manner and form as followeth, that is to say, York-
 shire to wit.—The jurors, &c. (here set forth the indictment).

CHAPTER XI.

OF THE REMOVAL OF THE INDICTMENT BY CERTIORARI.

THE writ of Certiorari is a writ issuing out of Chancery or the Queen's Bench, directed in the queen's name to the judges or officers of inferior courts, commanding them to return the records of ^a [*39] cause pending before them, in order that the party may have more time and speedy justice before her, or such of her justices as she shall assign, to determine its merits.

The Court of Queen's Bench having a general superintendency over all courts of inferior jurisdiction, may award a certiorari to remove the proceedings from any of them, except some particular statute or charter invests them with absolute judicature. The writ is returned into the Court of Queen's Bench in order that the issue may be tried at bar or nisi prius. It lies to remove all judicial proceedings, except where otherwise directed by the express provisions of some particular statute. The proper time for either party to apply for a certiorari is before issue has been joined on the indictment. In order to remove the indictment, the defendant must make an affidavit stating the grounds upon which the application is founded. The affidavit should be intituled in the Queen's Bench, and not in the name of the prosecution in the court below. If the application be made in term time, it must be made through counsel, for a rule to show cause why a writ of certiorari should not issue. In vacation, the affidavit is merely laid by a solicitor before a judge at chambers, who, if he thinks fit, grants his fiat for the certiorari. These forms are not essential where the prosecutor wishes to remove the indictment. The writ must be directed to the judge or magistrates of the inferior court. Immediately it is allowed and served, it operates as a ^a [*40] supersedeas. The return to the writ of certiorari is to be made to the party to whom it is directed. The proper mode of making the return seems to be to endorse on the back of the writ, "The executor of this writ appears in a certain schedule hereunto annexed;" then to send the schedule on a distinct piece of parchment. The schedule must be upon parchment.

CHAPTER XII.

THE ARRAIGNMENT OF THE PRISONER, &c.

THE bill having been presented, and the indictment found, the next step is to arraign the prisoner. In all cases of felony it is necessary that the prisoner should personally attend, and that fact must appear on the record. The arraignment consists of three things:—

1. Calling the prisoner to the bar by his name.
2. Reading the indictment to him so that he may understand the charge.

3. Demanding of him whether he is or is not guilty, and asking him how he will be tried.

The first ceremony is intended as an identification of the prisoner. The intention of reading the indictment is that the prisoner may fully understand the charge. He is entitled to have it so slowly read over to him that he may take it down in writing, so that if he wished to plead *autrefois acquit*, the indictment may be taken down, so as to be correctly stated iff the plea. Upon *this, the clerk says, "How say you; [*41] are you guilty or not guilty?" If the prisoner confesses the charge, the confession is recorded, and nothing is done till judgment; if he denies it, he answers, "Not guilty," upon which the clerk of arraigns, on the part of the crown replies that the prisoner is guilty, and that he is ready to prove the accusation; and this is done in an abbreviated form, by entering on the indictment two monosyllables, "*cul prit*:" *cul*, which means *culpabilis*, or guilty, and *prit*, which is put for *presto sum verificari*, and imports that he is ready to prove his words.

CHAPTER XIII.

PLEADINGS UPON INDICTMENTS.

WE come now to consider the various modes by which a prisoner places upon the record his objection or answer to the charge alleged against him. They are:—

1. Pleas to the Jurisdiction.
2. Demurrers.
3. Dilatory Pleas.
4. Pleas in bar of the Indictment.

Mixed of Record and Fact.

1. *Autrefois acquit*.
2. *Autrefois attain*.
3. *Autrefois convict*.
4. Matter of record, pardon, &c.

Pleas to the Matter of the Indictment.

1. Not guilty.
2. Special Pleas.

*In considering the nature of the several pleas, we come to examine those which the prisoner may offer to the jurisdiction [*42] of the court. They may be successfully relied on when the court has no cognizance of the crime alleged on the record, as where a party was accused of rape at the sheriff's court. This plea must always be pleaded before the general issue, because by pleading Not Guilty, the defendant

admits the power of the court to try him. To this plea of jurisdiction the crown may demur or reply *instantly*; and if the court determine against the plea, the defendant will have judgment to answer over to the felony.

The next mode by which the defendant may object to the indictment is by demurrer, and which means that the party will go no further, because the indictment is defective in substance or in formal statement. All formal defects of an indictment are to be taken by demurrer before the jury are sworn.

Pleas in abatement are founded either on some defect apparent on the face of the indictment, without reference to any extrinsic fact, or are founded upon some matter of fact extrinsic of the record, which renders the indictment insufficient. If a plea in abatement be found against the defendant in a case of felony, he shall have judgment of *respondens oster*.

Special pleas in bar show that the defendant ought not to be called upon to answer the indictment. The principal of these are a previous acquittal, conviction, and pardon.

[*43] *The plea of *autrefois acquit* is founded upon the principle, that no man shall be placed in peril more than once upon the same accusation. In order to entitle a prisoner to this plea, it is necessary that the crime charged be precisely the same, and that the former indictment, as well as the acquittal, was sufficient. If the charge be in truth the same, although the indictment differ in immaterial circumstances, the defendant may plead his previous acquittal with proper averments. The plea of *autrefois acquit* is of a mixed nature, and consists partly of matter of record and partly of matter of fact. The matter of record is the former indictment and acquittal; the matter of fact is the averment of the identity of the offence, and of the person as formerly indicted. In a case of felony, if the plea is held to be bad, the judgment is *respondens oster*, and the prisoner is then tried on the merits.

The plea of *autrefois convict* depends, like the one we have just considered, on the principle that no man shall be in peril more than once for the same offence. The crime must be the same as that for which the defendant was before convicted, and the conviction must have been lawful on a sufficient indictment. When a prisoner has either personally obtained a pardon for himself, or is included in a general pardon, he must plead that privilege specially, as otherwise the court is not bound to notice it. If there be variance between the denomination of the defendant in the indictment and in the pardon, or in his addition, he [*44] *may show, by proper averment of identity, that the same person is intended.

A pardon by public act of parliament need not be pleaded, as the court must notice it *ex officio*.

The plea of *Not Guilty* is called the general issue, and is pleaded by the prisoner, *viva voce*, at the bar. This plea makes it incumbent on the prosecutor to prove every fact and circumstance constituting the offence alleged in the indictment. The defendant may give in evidence

under this plea, not only everything which negatives the allegation in the indictment, but also all matter of excuse and justification.

CHAPTER XIV.

OF THE JURY AND PROCEEDINGS ON TRIAL.

In this chapter we shall treat of trial by jury, or, as it is sometimes called, trial by the country.

When the defendant upon an indictment has pleaded Not Guilty, the trial is by twelve jurors of the county where the fact is alleged in the indictment to have been committed. This jury is called, the *Petit Jury*, by way of distinction from the *Grand Jury*. Every man between the ages of twenty-one and sixty, residing in any county in England, who shall have within the same county £10 per annum, in lands or tenements, freehold or copyhold, *or who shall have within the same county lands held by lease for twenty-one years or longer, shall [*45] be qualified and liable to serve on juries. Peers, judges, clergymen and priests, dissenting clergymen, serjeants and barristers-at-law actually practising, doctors of law, practising attorneys, solicitors and proctors, and many others, are exempt from serving. No person attainted of treason or felony, or convicted of any infamous crime, unless he has obtained a free pardon, can serve. Besides the ordinary and special jury, there is one which aliens and denizens are by law entitled to demand. It is called a jury de medietate linguæ. It originates with 28 Edw. I. c. 13, which enacts, that in all inquests taken against aliens and denizens, half the jury shall be aliens, and half denizens. An alien must claim this privilege before the jury are sworn. The jury are the judges of the fact, as the judges are of the law.

The sheriff having returned into court the panel of the jury, and the time for trial having arrived, the clerk addresses them as follows:—"You good men that are empanelled to try the issue joined between our sovereign lady the queen and the prisoner at the bar, answer to our names." When this is done, and a full jury appears, the clerk addresses the prisoner thus:—"These good men that you shall now hear called are those which are to pass between our sovereign lady the queen and you; if, therefore you, or any of you, will challenge them, or any of them, you must do so as they come to the book to be sworn, before they are sworn, and you shall be heard." The clerk then calls [*46] each juror by name and swears him.

Now is the proper time for challenging the jury. A challenge is an exception to the jurors, and is either to the array or to the poll; to the array when the whole number empanelled are objected to, and to the poll when exception is made to one or more of the jurors as not indifferent. A challenge to jurors is divided into *peremptory challenge* and *challenge for cause*. Challenges to the array or the poll may be made either by the crown or by the defendant. Formerly, on the part of the crown, any

number of jurors might have been peremptorily challenged by merely *quod non boni sunt pro rege*; but under the stat. 33 Edw. I., when the panel has been exhausted, the crown must assign cause. No challenge can ever be made either to the array or to the polls until a full jury appear. Challenges on behalf of the defendant are either peremptory or with cause. Peremptory challenges are such as are made without assigning any reason, and which the court are compelled to allow. At common law the defendant might peremptorily challenge thirty-five. At the present day, in all cases of treason, the prisoner has still thirty-five peremptory challenges; but in murders, and all other felonies, only twenty. In no case of a misdemeanor can a peremptory challenge be allowed. Challenges for cause are of two kinds:—

1. To the whole array.
2. To individual jurymen.

[*47] *Some of the causes of a principal challenge are as follows:— If the sheriff be of actual affinity to either of the parties, or if he return an individual at the request of the prosecutor or defendant, if the challenge to the array be determined against the party by whom it is made, he may afterwards have his challenge to the polls. These challenges are either to the principal or to the favour. The most important causes of the first of these descriptions of challenges are *propter honoris respectum*, that is, where a peer is called to be sworn for the trial of a commoner; *propter defectum*, on account of some personal objection to the juror, as alienage or non-qualification in respect of age or property; *propter affectum*, that is, on the ground of some actual or presumed partiality in the jurymen challenged; and *propter delictum*, that is where a juror has been attainted of felony, or convicted of an infamous crime, or is under outlawry.

A challenge to the array must be made in writing; but where it is to a single individual, "I challenge him," and "we challenge him," for the queen is sufficient. The defendant is entitled to have the whole of the panel read over in his hearing, so that he may see who they are that appear. When a challenge has been made it lies with the court to direct the mode in which it shall be tried.

[*48] When a challenge is made to the poll, if it be a *principal challenge for some apparent partiality, it is sufficient if the ground be made out to the satisfaction of the court. But a challenge to the favour is left to the discretion of the triers. The triers being chosen, the following oath is administered to them:—"You shall well and truly try whether A. B. stand indifferent to the parties to this issue, so help you God." When the challenges are completed, and a full jury ready, the clerk administers the following oath:—"You shall well and truly try and true deliverance make between our sovereign lady the queen and the prisoners at the bar whom you shall have in charge, and a true verdict give according to the evidence, so help you God." As each juror is sworn he is set apart in the box; the clerk then counts them over. The crier then makes this proclamation:—"If any one can inform my lords, the Queen's justices, the Queen's serjeant, or the Queen's attor-

ney, or this inquest, to be taken between our sovereign lady the Queen and the prisoners at the bar, of any treasons, murders, felonies, or other misdemeanor committed or done by them, or any of them, let him come forth and he shall be heard for the prisoners now standing at the bar on their deliverance; and all others bound by recognizance to give evidence against the prisoners at the bar, let them come forth and give their evidence, or they will forfeit their recognizance,—God save the Queen !”

*CHAPTER XV.

[*49]

OF THE TRIAL AND EVIDENCE.

HAVING in the last chapter spoken of the jury, and the mode of challenging them, we shall now speak of the trial itself. The jury being sworn and assembled in their box, the clerk of arraigns addresses them thus, “Look upon the prisoner, you that are sworn, and hearken to the evidence.” He then proceeds to read an abstract of the indictment, in the following form: A. B. stands indicted by the name of A. B. &c. (here reading the indictment, or rather the material part of it,) after which he adds, “Upon this arraignment he has pleaded not guilty, and for his trial hath put himself upon the country, which country you are; so that your charge is to inquire whether he be guilty of the felony whereof he stands indicted, or not guilty.”

The counsel for the prosecution now opens the case by laying a short statement of the facts before the jury, so that they may understand the bearing of the evidence which follows. This statement, to the honour of the bar, is always calm and temperate, the learned counsel always taking care to abstain from everything which may unfairly prejudice or bias the minds of the jury; indeed, such opening address is, as it should be, a simple outline of the facts to be proved in evidence, together with such comments as are necessary to render them intelligible to the jury.

*After this statement is concluded, the counsel for the prosecution proceeds to call his evidence, to prove the charge contained in the indictment; and this naturally leads us to a consideration of the doctrine of evidence in criminal prosecutions. However, it will perhaps be well to say something as to those who are competent to be witnesses. [*50]

There are two kinds of exceptions to witnesses—the one to their competency, and the other to their credibility. We now speak of the exception to their competency alone. Such an objection goes to show that a witness ought not to be sworn at all, on account of some incapacity or defect. As a general rule, all persons may be witnesses who are capable of understanding the obligations of an oath. The first objection arises from the inability of the witness to understand the meaning of an oath, by reason of infancy or defect of intellect. Thus a person insane cannot be sworn whilst labouring under that malady, though he may, if he

recover his reason, in a lucid interval. A person deaf and dumb from his birth who understands signs, and who has a sense of moral obligation, may be examined, through the instrumentality of one who has been accustomed to converse with him by signs. Children, however young, if they understand the obligation of an oath, are competent witnesses. Formerly, there prevailed an opinion that a child under the age of nine or ten was incompetent. But this notion is exploded. In some cases, where a child appears to evince intelligence, but still does not understand [*51] the nature of an oath, a judge, sooner than allow justice to be defeated, will order the trial to be postponed, and direct that such child in the meantime shall be instructed upon the nature and obligations of an oath. Every person who believes not in the existence of a God, and in future rewards and punishments, cannot be a witness.

Before the Revolution, a notion seemed to prevail that no witness could be sworn but upon the Old or the New Testament; but since that epoch, it has been a settled practice to admit all persons to be sworn according to the ceremonies of their respective religions, provided they believe in a God, a future existence in which there is a dispensation of rewards and punishments. Thus a Mahometan may be sworn upon the Koran; a Gentoo, according to the mode of administering an oath in his own country; and a Scotch Covenanter, according to the mode of his faith. To those who frequent criminal courts in London, it is not an unusual sight to see a Chinese taking the oath by breaking a saucer. If it be suspected that one is incompetent upon the ground of belief, he should be examined upon the *voire dire* (*veritatem dicere*); and he cannot be asked as to any particular tenets he may hold, but simply whether he believes in a God and a state of future retribution. Quakers are allowed to affirm by act of parliament, as they believe all swearing illegal, by a too literal reading of the seventh chapter of Matthew, ver. 37, wherein it is said, "Swear not at all." For a long time their affirmation [*52] was rejected in criminal, though admitted in civil cases. The relationship of husband and wife destroys competency, and parties so intimately connected are not permitted to give evidence which may tend to criminate each other. Thus, on an indictment for bigamy, the first wife cannot be a witness; the second may, after proof of the first marriage, because, in the eye of the law, the second was no marriage at all.

There are some exceptions to this rule, justified by necessity. Thus a lawful wife is a good witness against the husband in case of violent injury to her person; and the dying declaration of the wife, if the husband be suspected of having murdered her, may be read as evidence on his trial. Another ground of incompetency, until the passing of the statute 6 & 7 Vict. c. 85, was infamy. Thus, persons committed of treason, felony, piracy, *præmunire*, perjury, forgery, or any species of the *crimen falsi*, were incompetent. But this statute enacts, that no person offered as a witness shall be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, on the trial of any issue, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, having authority to receive and

examine; but every such person may be offered as a witness. An accomplice was always considered a competent witness; and upon his evidence alone, according to the strict letter of the law, a prisoner may be convicted: but the judges invariably concur in their practice, in advising *juries never to convict upon the uncorroborated evidence of an accomplice. Having spoken of what witnesses are incompetent, we shall now proceed with a view of the trial, and in the next chapter speak of evidence in general. The credibility to be attached to any witness is a question for the jury alone. [*53]

When the witnesses for the prosecution are brought into court, they are called by their names to be sworn. The clerk of arraigns, desiring the witness to take the book in his right hand, then says to him, "The evidence you shall give between our sovereign lady the queen and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth, so help you God." The witness must be sworn in open court, so that his manner may be observed, and he may be subjected to cross-examination on behalf of the prisoner. Before the examination commences, the crown may require that the witnesses should go out of court, so that they may be examined in the absence of each other; and the same request will be granted as a matter of indulgence to the prisoner. When the witness is sworn, he is examined by the counsel for the prosecution, or if none be retained, by the judge presiding. This latter course is a bad practice lately crept in from a false economy, placing the judge in the awkward dilemma of being both prosecutor and defender of the prisoner; for where a prisoner is undefended, the law presumes that the judge will act in the place of his counsel. It is usual for one counsel only to *examine the same witness. In examination in [*54] chief, the counsel should take care not to put leading questions to the witness; that is, questions in such a form as suggest the answer desired; but still he must state his question so that no material circumstance is omitted. If a witness appears desirous of concealing the truth, or to favour the prisoner, the court will allow a latitude bordering on cross-examination to the prosecuting counsel. A witness must not read his evidence, but he may refresh his memory from any memoranda book or paper, provided he can afterwards swear to the fact from his own knowledge.

During his examination, a witness cannot be compelled to answer any question which may subject him to a criminal accusation. When the examination in chief of the witness is concluded, the prisoner, or his counsel, may cross-examine as to every part of his evidence. In cross-examination, great latitude is allowed, so much so that questions may be asked respecting matters communicated in a professional confidence, for if the opposite side have brought forward counsel or solicitor, they have broken the ties which bind him to silence. Leading questions are also allowed in cross-examination; and, in order to try the credit of a witness, facts may be supposed which have no real existence; but this right should be exercised very sparingly, as it may tend to distract the minds of the court and jury from the question at issue; and a counsel ought at once to bow to any intimation from the court that there is a departure

[*55] from the issue. In *cases of misdemeanor, it has lately been contended that a bill of exceptions will lie; but it is not felt that, in a small treatise of this kind, one need enter into this question. When the evidence for the prosecution is concluded, the prisoner makes his defence through his counsel, and then, if advisable, proceeds to call evidence; after this, the prosecuting counsel is, if evidence be called, entitled to a reply. The attorney and solicitor-general have a right to reply, in all cases, on the part of the crown, whether evidence be called for the defence or not.

If it is impossible to conclude the trial in one day, the court may adjourn, from day to day, until the trial is completed. If a juryman be taken ill during the trial, though of a capital offence, or die, the jury may be discharged, and the prisoner must be tried by another jury. Besides this, the crown, with the consent of the prisoner, may withdraw a juror, in order either to try him again or to put off the trial. During the trial, and whilst the court are sitting, the judges have a power to punish contempts, and they may fine a person offending, and command it to be immediately levied. When the evidence and speeches on both sides are concluded, the judge sums up the evidence. The jury then consider their verdict. If they cannot agree, they retire to a private room to deliberate, in the custody of a bailiff, who is sworn as follows: "You swear that you will keep this jury without meat, drink, or fire, candlelight only [*56] excepted. You shall suffer *none to speak to them, neither shall you speak to them yourself, excepting to ask them whether they are agreed, without leave of the court, so help you God." The jury cannot separate until they are agreed, without the special permission of the court. The judges, however, may adjourn whilst they deliberate. A jury, charged and sworn in a capital case, cannot be discharged until they have given a verdict, unless one of the jury be taken dangerously ill, so that fatal consequences might ensue. When they have come to an unanimous determination, they return into court to deliver their verdict. The clerk calls them over by their names, and asks them if they are agreed, and then says, "How say you, gentlemen, is the prisoner guilty or not guilty?" The clerk then enters the verdict on the record. The formal proceedings of the trial are now closed.

We shall now, before treating of verdict, and the subsequent proceedings thereon, proceed, in the next chapter, to speak of evidence in general as applicable to criminal prosecutions.

CHAPTER XVI.

OF EVIDENCE.

THERE is no great difference in the rules of evidence between civil and criminal proceedings. In the latter, however, a greater caution prevails, from an anxiety of the judges to look more favourably, where life, liberty, and reputation are at stake, towards the prisoner, than they do perhaps

***in civil cases.** The rules of credibility are the same in both cases. Nothing can be given in evidence which does not directly [*57] tend to the proof or disproof of the matter in issue; therefore, as Mr. Phillipps lays it down in his "Law of Evidence," it is not allowable, upon the trial of an indictment, to show that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. But, where several felonies are so connected together as to form an entire transaction, upon an indictment for the one, the other may be proved, to show the character of the transaction. An exception to this general rule appears to prevail in the case of forgery; the prosecutor being allowed to give evidence of other instances of his having committed the same offence for which he is indicted.

Upon a recent trial for uttering a forged bank note upon the northern circuit, before Mr. Justice Cresswell, the counsel for the prisoner raised an objection to the reception of this kind of evidence; but the learned judge admitted it on the ground that he was bound by precedent. It may be gathered, however, from the important case of *Regina v. Oddy*, argued before the Lord Chief Justice and four of his learned brethren, in the Court of Criminal Appeal, that the tendency of the courts is not to extend any further this species of evidence. That was an indictment containing counts for stealing and for receiving the property of A., knowing it to be stolen. At the trial it was proved that the cloth *mentioned in [*58] the indictment had been stolen in the night, between the 2d and 3d of March, A. D. 1851, from a mill, and was the property of the party named in the indictment. The prisoner gave a false account of the manner in which he became possessed of the cloth. The prosecuting counsel proposed to give in evidence of the possession by the prisoner of four other pieces of cloth, which had been stolen between the 4th and 5th December, A. D. 1850, from another mill, and which cloth was the property of different owners. Prisoner's counsel objected to the reception of this evidence. The learned recorder, before whom the case was tried, admitted the evidence. The lord chief justice, in giving judgment in the Court of Criminal Appeal, thought the evidence ought not to have been received, and observed—"The English law does not permit the issue of criminal trials to depend on this species of evidence. The proposed evidence would only show the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue—namely, that, at the time he received these articles, he knew them to be stolen. The cases of uttering with a guilty knowledge certainly go very far, and I should be very unwilling to apply their principle generally to the criminal law."

It is difficult to draw a distinction in principle between the reception of such evidence in the case of uttering and receiving stolen property, without it be in this, that, in the former case, a person having previously uttered forged instruments might be *presumed to have a better [*59] knowledge of the character of a forged instrument. Where it is necessary to prove malice, acts not included in the indictment are admissible in evidence. Thus, if A. be charged with the murder of B., it is competent to show that A., on other occasions, had attempted to assassi-

MARCH, 1854.—19

nate B. On an indictment for rape, the prisoner may give general evidence of the woman's character for want of chastity, and he may even go so far as to show that she has been criminally connected with him before. It is necessary for a prosecutor to substantiate with evidence every material part of the indictment. And as now, since the recent stat. 14 & 15 Vict. c. 100, nothing should appear upon the face of the indictment in the shape of immaterial averment, it may be said to be necessary to prove the indictment; and, as a general rule, he must prove so much as proves the substantive crime stated, though not to the extent charged. Any thing superfluous need not be proved, although stated on the face of the indictment.

One witness is sufficient proof in all cases, except in treason and perjury. In the latter case, it used to be thought that two witnesses as to the falsity of the perjury assigned were necessary; but this doctrine has, since the case of *Regina v. Boulter*, decided in the Court of Criminal Appeal in 1852, been somewhat modified. In that case it seems to have fallen from the judges that the evidence of one witness, and something more in the shape of corroboration, would be sufficient.

[*60] *From the secrecy with which crimes are committed, juries are often compelled to receive evidence merely of a circumstantial and presumptive character. This species of evidence ought to be received with great caution, as there are many melancholy instances of persons who have suffered death, upon this kind of evidence, for offences of which they were innocent. Circumstantial and presumptive evidence should be of the clearest and strongest nature.

It is a general rule, that the best evidence the nature of the case admits of must be produced; and, if it cannot, then the next best evidence. And this is an infallible rule both in civil and criminal cases, for a suppression of the strongest testimony induces a vehement presumption, that if it were brought forward, it would be against the party who is desirous of evading it. For instance,—supposing a copy of a deed to be offered in evidence, and it is known that the *original* is in the possession of the person offering the *copy*, a suspicion is naturally thrown upon its correctness, for why produce a *copy* when he possesses the original? No parol evidence will be admitted of the contents of a writing in the power of the party offering it to produce. If it be proved, however, that the original has been lost or destroyed, or that it is in the hands of the defendant, a copy may be given as the best evidence; and if no copy has been taken, parol evidence may be received of its contents. As a general and inflexible rule, hearsay evidence is inadmissible.

[*61] *The law admits of no evidence but such as is delivered upon oath. Declarations, however, of a witness at another time may be adduced to invalidate or confirm his evidence. A dying declaration is receivable, provided the person at the time of making it had no hope of recovery. The confession of a prisoner may also be given in evidence against him at his trial; but, as I have shown in another part, that statement must be made voluntarily, and without threat or solicitation. As this kind of evidence is open to suspicion, from the fear or terror of a sudden accusation, and liable, like all hearsay evidence, to be misre-

ported, it should be only received under peculiar circumstances. The confession must be taken altogether, so that any part which may be in his favour may be considered by the jury. It should be free from all suspicion. The law of England acts upon a principle diametrically opposite to those continental nations who employ torture to extort confessions. An English court receives such confession most unwillingly, and with the greatest delicacy. Such confession can only be evidence against the person making it.

All evidence divides itself into parol and written. I have already said sufficient upon the former. I shall now add a few words upon written evidence. These are public documents or records, private papers in the handwriting of the party or others, and depositions duly taken before the magistrates. Public acts of parliament prove themselves, as the judges are bound to take judicial notice of them. *A [*62] private act of parliament must, however, be examined before the parliament roll before it can be given in evidence. State matters may be proved by the production of the Gazette Muster Books; and the returns of the Navy Office are evidence of the death of a party so returned. Corporation books, regularly kept, are evidence, as also heralds' books, and the minutes of visitation. The daily book of a prison is good evidence to show the time of a prisoner's discharge, though not of his commitment. The records of the court are good evidence against persons who are parties to them. Deeds or papers in the possession of third persons, and material to the trial, must be obtained by serving the person with a subpoena duces tecum. He is, under such subpoena, bound to produce them. A prisoner is not bound, however, to produce evidence against himself, the maxim being *nemo tenetur se ipsum accusare*. If a necessary document be traced to a prisoner's possession, and he will not produce it, secondary evidence may be given of its contents. A deed more than thirty years old proves itself. In other cases, it must be proved by the subscribing witness, if he be living; if dead, by proving that the signature is the handwriting of the party by whom it professes to have been written.

We shall now say something of the kind of proof by which handwriting is to be disproved or established. If a person has seen another write the document in question, he should be called; if, however, no person has seen the *document written, the evidence of a person [*63] acquainted with the handwriting of the party may be received, to establish or overthrow the identity of the document in question. The witnesses so called must have actually seen the party write, or have received letters from him which bear his signature. This last species of evidence often brings a very strong moral certainty both as to the person and the signature; and the habit of receiving and answering letters may furnish oftentimes a better means of speaking to handwriting than having occasionally seen the person write at long intervals. Since the celebrated case of *Algernon Sydney*, the evidence of a person who has merely occasionally seen the supposed writing of the party in indorsements upon bills will not be received in evidence. Much doubt has existed respecting the admissibility of a mere comparison of handwriting, where no

witness has seen the party write, or has received letters authenticated with his signature; and it is clear that the evidence of a third person to prove merely from his own skill and practice, that the same individual wrote two distinct papers ought to be rejected.

At the last Central Criminal Sessions, held at the Old Bailey, in the case of *Regina v. Lewis Coleman and Joseph Gurney*, who were indicted for forgery and uttering a forged bill of exchange, Mr. Justice Cresswell refused to receive the evidence of a scientific gentleman, who was called to prove that the *drawing, acceptance, and indorsement* were all in the same handwriting; and his *lordship, in a lucid judgment, explained the principles upon which such evidence was inadmissible, according to English law. Such scientific witness, it appears, would not be rendered competent by having seen the party write since the commencement of the prosecution, if called upon to give evidence in the prisoner's *favour*.

A person employed to detect a forgery may, it appears, be called to state whether, in his opinion, the handwriting produced in court is a natural or a disguised one. It appears, that where a written document is the very subject of the prosecution, and is required by the provision of the legislature to be stamped, and where the stamp act forbids its being offered in evidence unless it is so stamped, it cannot be received without the provisions of the legislature have been complied with. Such document may, however, be read for collateral purposes. This general rule, however, has by a course of decision been somewhat modified, for in cases of forgery it has been decided that a fictitious instrument may be given in evidence which the prisoner intended to pass for a valid one, though no stamp had been affixed of legal denomination or value.

Depositions of witnesses taken before a magistrate may, under certain circumstances, be received in evidence. We have, in a previous part of this little book, shown the mode in which these depositions should be taken before the magistrate; and where duly taken, and purporting to be signed by the magistrate, they may be read where the witness is dead, [*65] unable to travel, or kept away by the *defendant's contrivance. Where two or more prisoners are jointly indicted, and a deposition is offered in evidence, upon proof of one of the prisoner's procuring and contriving the absence of such witness, it is the duty of the learned judge to tell the jury that it is only evidence against the prisoner so contriving the absence; and this was decided by the Lord Chief Justice and judges of the Queen's Bench, in the case of the Queen against Scaife and Rooke, a case which had been removed from the Borough General Quarter Sessions at Hull into that court by writ of certiorari. A new trial was granted in that case; and it is remarkable, that it is the first case upon record of a new trial having been granted in a case of felony. We shall have to refer to this case more fully when we come to speak about *new trials*.

CHAPTER XVII.

VERDICT.

HAVING somewhat digressed in the last chapter from the proceedings of the trial, in order to consider the evidence applicable to criminal cases in general, we shall now resume our inquiry by a consideration of the *verdict*.

In all cases of treason and felony a verdict must be delivered openly in court, and in the presence of the prisoner. In trials for misdemeanors, however, a privy verdict may be given, and the presence of the defendant is not essential.

*A verdict may either be *general* as to the whole charge, *partial* as to a part, and *special* where the jury find the facts, and [*66] leave the legal inference to the judge. A jury may find a *general verdict* if they think fit so to do. Such a general verdict includes both the law and facts of the case. There are many cases in which it may be prudent for the jury to find the facts specially, and leave the inference to the judge as to the law, where that is doubtful. Formerly, in the cases of libel, it was held that the jury were only to find the mere fact of authorship or publication, and that the judges were to determine as to the libellous quality of the document which formed the subject of the charge. There was much discussion upon the question by Lord Erskine, in the case of the Dean of St. Asaph. The 32 Geo. III. c. 60, enacted that the whole question should be left to the jury.

The jury may find a *partial verdict*, by saying not guilty of a part, but guilty of the residue of the charge. Thus, upon an indictment for murder, a prisoner may be convicted of manslaughter; on a charge of burglary, he may be convicted of *larceny*, and acquitted of the *burglary*. In a case of robbery, if it appear that the property was not taken from the person by violence or putting in fear, he may be convicted of larceny. Until recently, under the 7 Will. IV. & 1 Vict. c. 85, s. 11, on the trial of an indictment for any felony which included an assault, the prisoner might have been convicted of the assault only, if the evidence proved no more. The statute, however, *created great confusion in the [*67] principles of criminal law, and from its inconvenience has been recently repealed by the legislature.

That statute clashed with a general and well established rule of law, which was, that upon an indictment for *felony*, a person should not be convicted of a *misdemeanor*. And the reason of this seems to be well founded, as defendants, in cases of misdemeanor, were entitled to certain privileges and advantages which those charged with felony were not. Therefore, by allowing a person indicted for felony to be convicted of misdemeanor, it was virtually depriving a defendant of those advantages. In an indictment for perjury, it is sufficient if one of the assignments of perjury be proved. In larceny, if any one of the articles enumerated in the indictment be proved to have been stolen, that will be sufficient. It

was formerly thought, that where the evidence went to show the commission of a higher offence in degree than that charged in the indictment, it was necessary for the court to discharge the jury; but recent decisions, and even a statutable enactment, has set this matter at rest; and now, if the evidence is sufficient to support the minor charge, though it prove something more, it is sufficient.

A jury have a right, in all criminal cases, to find a special verdict. They find the facts, and refer the matter of law to the judge. Such a verdict must state the facts themselves, and not the evidence adduced to [*68] prove them; and, as the court cannot supply by intendment or implication *any defect in the statement, all the facts necessary to enable the court to give judgment must be found. Thus, an indictment charging a robbery from the person, the evidence being a taking up of the prosecutor's money from the ground in his presence, a special verdict stating that the defendant struck the money out of his hand, and immediately took it up, was held insufficient, because it did not expressly state that he was *present* at the taking of it up. If the jury find all the substantial parts of the charge, they are not bound to follow the technical language of the indictment. Thus, upon a charge for forgery of a bank note, the jury found that the prisoner erased and altered it by changing the word "two" into "five." This was held to be sufficient. After a statement of the facts, the jury ought not to draw any legal conclusion, for that is the province of the court; and such conclusion, if drawn, will be treated as superfluous; and if they exceed their duty in so doing, the court will pronounce such judgment as they think warranted by the facts. It was formerly thought, that in a capital case a special verdict could not be amended; but it is now held, that although a special verdict could be amended in matters of fact, yet the court may amend a mere error of form in capital cases, and more especially where such alteration is to fulfil the evident intention of the jury.

If a jury, through mistake or partiality, deliver an improper verdict, the court may, *before it is recorded*, desire them to reconsider it. They [*69] *cannot, however, be allowed to make any alteration after the verdict is recorded.

When the prisoner is convicted by the jury, he is either at once called upon to show cause why the judgment of the court should not be passed upon him, or made to stand by, to await the delivery of his sentence. When a prisoner is acquitted upon the merits on a sufficient indictment, he is forever discharged from that accusation. In this respect our law differs from the civil, which merely discharged him from *that accuser*, allowing other prosecutions to be instituted at future periods. After such acquittal he may at once be set at liberty; but it is the usual practice at the assizes not to apply for a prisoner's discharge until the Grand Jury be dismissed, as it might be possible that during their session other bills might be preferred against the defendant.

Under 39 & 40 Geo. III. c. 94, s. 1, if, upon the trial of any person for treason, murder, or felony, his insanity at the time of the commission of the offence is given in evidence, and the jury acquit him, it is necessary that they should find specially whether he was insane at the time of

the commission of the offence, and to declare whether he is acquitted upon such ground of insanity. If the jury find in the affirmative, it is the duty of the court before whom he was tried to make an order that he shall be kept in strict custody until the pleasure of the queen be known; and the queen may order the imprisonment of such person during pleasure. By the 3 & 4 Vict. c. 54, s. 3, the same *provisions are extended to persons charged with misdemeanor. If a prisoner, [*70] upon his arraignment, is insane, and so found by a jury empanelled for that purpose, the court may order such finding to be recorded, and the prisoner to be confined until her Majesty's pleasure be known, which is in effect until he is in such a sound state of mind as to be able to plead.

If one of the jury die before the delivery of the verdict, the remaining eleven will be discharged, and a new jury may at once be sworn, or a new juror added to the eleven, and he may be tried immediately. The same course may be adopted where a juror is taken so ill as not to be able to remain on the jury. In the case where a juror is added to the eleven, they must be sworn anew, and the prisoner is entitled again to have his challenges. If the trial is not concluded on the same day on which it began, the judge has authority to adjourn it from day to day. In such cases the jury, on a trial for treason or felony, are kept together during the night, under charge of an officer of the court. This is not done, however, in cases of misdemeanor; but the court may, if they think fit, even in misdemeanor, order that they may so be detained, as in cases of felony.

*CHAPTER XVIII.

[*71]

OF PROCEEDINGS BETWEEN VERDICT AND JUDGMENT.

A SPECIAL verdict, involving points of difficulty and importance, and formed at the assizes, may be removed, by certiorari, into the Court of Queen's Bench. When the offence is capital, the prisoner is immediately asked, by the clerk of arraigns, what he has to say why judgment of death should not be pronounced against him; and this is done immediately after conviction. Where a prisoner has been found guilty in the Court of Queen's Bench, whether on an indictment originally taken there, or removed thither by certiorari, the mode of proceeding is somewhat different. All the authorities in the books go to show, that in cases of felony or treason no new trial can in any case be granted; and it is said, if the conviction appears to be improper, the judge may respite the execution, to enable the defendant to apply for a pardon. Though this position is for the most part correct, it must be received with some qualification, for it has now been decided, by the judges of the Court of Queen's Bench, that where a case of felony is removed, by certiorari, from an inferior jurisdiction into their court, a new trial may be granted, for a misdirection, at the trial, of the *learned judge who tried the case. And the principle seems to be this: that where such [*72]

a case is removed into the Court of Queen's Bench, and is sent down to be tried at Nisi Prius, that all the incidents of a trial at Nisi Prius attach to it. This was decided in the case of Regina against Rooke and Scaife, which was an indictment for felony, and which was removed, by certiorari, into the Court of Queen's Bench, and the record sent down to be tried at Nisi Prius, at the Yorkshire Assizes. This is the only case we can find in the books of a new trial having been granted in a case of felony. And it is important to know this, as a prisoner upon a charge of felony will, by a removal of the record into the Queen's Bench, have an advantage he would not possess if tried by an inferior court.

In all cases of misdemeanor after a conviction, the superior courts may grant a new trial. Inferior courts have no power to do so upon the merits, but only for an irregularity in the proceedings. After a special verdict, a *venire facias de novo* is the proper mode of proceeding; and, after a general verdict, an application for a new trial. The difference between a new trial and a *venire facias de novo* is, that the former may be granted upon the ground of improper direction, misconduct of jurors, and for a variety of other causes; whilst the latter is only grantable where *some mistake is apparent on the record*. A new trial cannot in general be granted on the part of the prosecutor after the defendant has [*73] been acquitted, though the verdict should appear to be against evidence. The motion for a new trial is made upon affidavits of the circumstances. The defendant may, at any time between conviction and sentence, but not afterwards, move the court in *arrest of judgment*. This motion must be grounded on objections which appear upon the face of the record itself; therefore no defect in evidence, or improper conduct at the trial, will be sufficient. Even if the defendant omits to make any motion in arrest of judgment, the court may, if they are satisfied that the defendant has not been convicted of an offence in law, arrest the judgment. If the judgment be arrested, all the proceedings are set aside, and a judgment of acquittal given. There is no bar, however, to a fresh indictment.

CHAPTER XIX.

OF JUDGMENT.

SENTENCE, in capital cases, is usually given immediately after the conviction; and it may be observed that, in all capital cases except high treason, the court before which the offender is committed is authorised to abstain from pronouncing judgment of death, if it shall be of opinion that the offender is a fit subject to be recommended for the royal mercy. Before judgment is pronounced, in such cases, upon the prisoner, the crier makes a proclamation, commanding all manner of persons [*74] to keep silence whilst sentence of death is passed upon the prisoner at the bar, upon pain of imprisonment. It is necessary that the prisoner should be first asked if he has anything to say why the judg-

ment of the court should not be passed upon him; and it is necessary that this should appear upon the face of the record. It is not to be expected that, in a small work of this kind, we can enter into the various punishments inflicted by the law; and we can only refer the reader who may want further information upon this subject to Mr. Archbold's or Mr. Russell's excellent works upon Criminal Law.

When the defendant is acquitted upon the merits, the proper entry upon the record is—"Whereupon all and singular the premises being seen and fully understood by the court of our lady the queen now here, it is considered and adjudged by the said court that the said defendant be discharged of the premises, and do depart hence without delay."

When the judgment is pronounced, it should be entered upon the record. The record so made up, in case of felony, states the session of Oyer and Terminer, the commission of the judges, the presentment of the grand jury by name, the indictment, the delivery of the indictment into court, the arraignment, the plea, the issue, the award of the jury process, the verdict, the asking the prisoner why sentence should not be passed on him, and the judgment passed by the judges.

*CHAPTER XX.

[*75]

OF WRIT OF ERROR.

A WRIT of error to reverse a judgment lies from all inferior jurisdictions to the Queen's Bench, and from thence to the House of Lords. Lord Mansfield, in speaking of writs of error, says, that until the reign of Queen Anne, a writ of error, in any criminal case, was held to be merely *ex gratia*. It was then laid down, that writs of error, in criminal cases, were not grantable *ex debito justitiæ*, but *ex gratia regis*; and that, in such a case, a man ought to make application to the king, and he will refer to his counsel, and if they certify that there is cause, he will grant a writ of error.

In the third year of the reign of Anne, it was resolved by ten of the judges, that in every case under treason and felony, a writ of error was not merely a matter of favour, but of right, and ought to be granted. But even in misdemeanors, this is only to be understood to mean where there is probable cause of error. It does not issue as a matter of course, but under the fiat of the attorney-general. If probable grounds are laid before the attorney-general, and he improperly refuse to issue his fiat, the court will compel him so to do.

A writ of error lies, for all defects, upon the face of the indictment, and which are not cured by verdict, for any irregularity in the awarding of the jury *process, defect in the caption, for irregu- [*76]
larity in the verdict or judgment, for the omission of the demand of the defendant what he has to say why the court should not proceed to judgment against him. In cases where a writ of error is allowed for any

mis-awarding of the jury process, the court should direct the sessions to award a *venire de novo*.

During the time the writ is pending, in treason and felony, the prisoner remains in custody. In misdemeanors, however, he may be admitted to bail. In cases of wilful delay and neglect to prosecute the writ, the court will order it to be quashed.

CHAPTER XXI.

RECORD OF CONVICTION AND JUDGMENT FOR MURDER.

HAVING now reviewed the proceedings from arrest to judgment, it may be as well to present the reader with a view of those same proceedings as they would appear upon a record when made up. We have taken a case in which the prisoner is supposed to have been tried and convicted of murder at the assizes, the record of which trial and conviction would be as follows:—

Yorkshire, } “Be it remembered, that at the General Session of our lady
to wit. } the queen, of Oyer and Terminer, holden at the castle of
 [*77] York, in and for the said county of York, on Friday, the twelfth
 *day of March, in the fifteenth year of the reign of the lady
 Victoria, queen of Great Britain, before Sir Cresswell Cresswell, one of
 the justices of our said lady the queen, of her Court of Common Bench,
 and others their fellows justices of our said lady the queen, assigned by
 letters-patent of our said lady the queen, under her great seal of Great
 Britain, made to them the aforesaid justices and others, and any two or
 more of them, whereof one of them, the said Sir Cresswell Cresswell, and
 Sir Thomas Noon Talfourd, our lady the queen would have to be one to
 inquire, by the oath of good and lawful men of the county aforesaid, by
 whom the truth of the matter might be the better known, and by other
 ways, methods, and means, whereby they could or might the better
 know, as well within the liberties as without, more fully the truth of all
 treasons, insurrections, rebellions, counterfeitings, clippings, wastings,
 false coinings, and other falsities of the moneys of Great Britain, and of
 other kingdoms or dominions whatsoever; and of all murders, felonies,
 manslaughters, killings, burglaries, rapes of women, unlawful meetings
 and conventicles, unlawful utterings of words, unlawful assemblies, mis-
 prisons, confederacies, false allegations, trespasses, riots, routs, reten-
 tions, escapes, contempt, falsities, negligences, concealments, mainten-
 ances, oppressions, champerties, deceits, and all other misdeeds, offences,
 and injuries whatsoever; and also the accessories of the same within the
 [*78] county aforesaid, as well within liberties as without, by whom-
 soever and howsoever done, *had, perpetrated, and committed; and
 by whom, to whom, when, how, and in what manner, and of all
 other articles and circumstances in the said letters-patent of the said
 lady the queen specified, the premises, and every or any of them, how-

soever concerning, and for this time to hear and determine the said treasons and other premises according to the laws and customs of the realm of England.

And also keepers of the peace and justices of the said lady the queen, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the county aforesaid, by the oath of William Bethell, William Constable Maxwell, Francis Cholmley, Edward Petre, Charles Langdale, Joseph Smith, William Raines, Richard Savage, Thomas Joseph Owst, David Burton, George Pelsant Dawson, William Liddell, Francis Lawley, Laurence Hall, and Charles Carter, Esquires, good and lawful men of the county aforesaid, then and there impanelled, sworn, and charged to inquire for the said lady the queen, and for the body of the said county—it is represented that Andrew Smith, late of the parish of Cottingham, in the said county, labourer, on the tenth day of June, in the year of our Lord 1851, feloniously, wilfully, and of his malice aforethought, did kill and murder Joseph Jones; whereupon the sheriff of the county aforesaid is commanded that he omit not for any liberty in his bailiwick, but that he take the said Andrew Smith, if he may be found in his bailiwick, and him safely keep to answer to the felony and murder whereof he stands indicted; *which said indictment the said justices above named, afterwards, to wit, at the [*79] delivery of the gaol of the said lady the queen, holden at York, in and for the county aforesaid, on Friday, the eighteenth day of March, in the said fifteenth year of the reign of the said lady the queen, before the said justices and others their fellows justices of our said lady the queen, assigned to deliver her said gaol of the county aforesaid of the prisoners herein being, by their proper hands to deliver here in court of record in form of the law to be determined; and afterwards, to wit, at the delivery of the said gaol of the said lady the queen, of her county aforesaid, on the said eighteenth day of March, in the said fifteenth year of the reign of the said lady the queen, before the said justices of the said lady the queen, above named, and other their fellows aforesaid, here cometh the said Andrew Smith, under the custody of William Empson Stead, esquire, sheriff of the county aforesaid, in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he hath been before committed, being brought to the bar here in his proper person by the said sheriff, by whom he is here also committed; and forthwith being demanded concerning the premises in the said indictment, above specified and charged upon him, how he will acquit himself thereof, he says that he is not guilty thereof, and thereof for good and evil he puts himself upon the country; and Sir John Bayley, baronet, clerk of the assizes for the county aforesaid, who prosecutes *for our said lady the queen [*80] in this behalf, doth the like. Therefore let a jury thereupon here immediately come before the said justices of the lady the queen, and others their fellows aforesaid, of free and lawful men, of the county of York aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Andrew Smith, to recognise, upon their oath, whether the said Andrew Smith be guilty of the felony and murder in the indictment aforesaid, because as well the said Sir John

Bayley, who prosecutes for the said lady the queen in this behalf, as the said Andrew Smith, have put themselves upon the said jury; and the jurors of the said jury, by the sheriff for this purpose impanelled and returned, to wit, David Williams, John Smith, Thomas Horn, Charles Nokes, Richard May, Walter Duke, Matthew Lyon, James White, Oliver Green, Bartholomew Nash, and Henry Long, being called, come, who, being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oath, say, that the said Andrew Smith is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid. And upon this, it is forthwith demanded of the said Andrew Smith, if he hath or knoweth anything to say wherefore the said justices here ought not, upon the premises and verdict aforesaid, to proceed to judgment and execution against him, who nothing farther saith, unless as he before had seen. Where-
 [*81] upon, all and singular, the premises *being seen, and by the said justices here fully understood, it is considered by the court here that the said Andrew Smith be taken to the gaol of the said lady the queen, of the said county of York, from whence he came, and from thence to the place of execution, on Monday now next ensuing, being the twenty eighth of this instant, March, and there be hanged by the neck until he be dead."

CHAPTER XXII.

OF REPRIEVES AND PARDONS.

THE term reprieve is derived from *reprendre*, to keep back, and is virtually the withdrawal of the sentence for an interval of time, and operates in delay of execution. A reprieve may be either granted by her majesty, or by the judge who tried the case, or from the operation of law, in circumstances which render an immediate execution inconsistent with humanity and justice. When it proceeds *ex mandato regis*, or from the mere pleasure of the crown, the intention of her majesty may be signified by a verbal message; but the more usual course is to send the reprieve under the privy signet. A reprieve proceeding from the judge himself, or one, as it is called, *ex arbitrio judicis*, is merely discretionary. This power belongs of right to every tribunal invested with authority to award execution. It may even be exercised in cases of treason.

[*82] *There are some cases in which a judge, *ex necessitate legis*, is bound to reprieve: thus, where a woman is convicted of treason or felony, she may allege pregnancy in delay of execution. This has been a rule in England from the earliest period, and seems to have been borrowed from the laws of ancient Rome, which directs *quod prægnantis mulieris damnatæ poena differatur quoad pariat*. To render this plea available, she must be quick with child; and if she so allege, a jury of twelve matrons are empanelled and sworn, to try whether or not she is

quick with child. They then retire with her to some convenient place and make an examination; and if they find in the affirmative, she is reprieved until after delivery. Another ground for which the judge is bound to grant a reprieve is the insanity of the prisoner.

As the queen is herself the legal prosecutor in every indictment for crime, it follows, that she may, by means of a pardon, remit any punishment due to public justice, or any fine, after the offence has been committed. By the Act of Settlement, no pardon under the great seal of England can be pleadable in bar of an impeachment; but when the proceedings are finished, her prerogative is no further limited. And history furnished a remarkable instance in the case of the six noblemen, who, in 1715, joined with the Pretender, and who received the royal pardon. The prerogative of pardon is generally a matter of pure discretion, to be exercised by the crown in the manner it deems proper. A pardon may be granted either by a *general act of pardon or by virtue of a special pardon under the great seal. In order to render it valid, [*83] it must express with sufficient accuracy the crime it is intended to forgive. A general pardon of *all felonies* would be bad. An act of grace by parliament need not specify any particular instance of crime. A pardon may be extended to the subject on any condition her majesty pleases to annex, whether precedent or subsequent, on the performance of which the validity of the pardon depends; and, in general, a pardon to felons is granted on the condition of transportation, and this is allowed by the Habeas Corpus Act and subsequent statutes.

The effect of a pardon is to give the prisoner new capacity, credit, and character; so much so, that he may sustain an action for being called a felon as though he had never been convicted.

CHAPTER XXIII.

OF CRIMINAL INFORMATION.

WE shall now proceed, in this chapter, to say something of criminal informations. They are of two kinds, one in the name of the queen, the other at the suit of an informer; we shall speak, in the first place, of the former.

A criminal information is filed in the name of the queen, for the punishment of offences affecting *the interests of the public. The difference between a criminal information and an indictment is, [*84] that the former is tried upon the mere allegation of the officer by whom it is preferred, while the latter is founded upon the finding of a grand jury. Moreover, unlike an indictment, an information may be altered in substance and amended at any time before trial; and though the defendant should be acquitted, no action will lie for a malicious prosecution, as the leave of the court in which it is filed must first be obtained. Indeed, wherever a court of competent jurisdiction has once sanctioned a

prosecution, this establishes that there was probable cause for instituting it, and no action lies, though the prosecution fail.

The filing of criminal informations existed at common law. Mr. Justice Blackstone observes, speaking of informations, in the fourth volume of his Commentaries, as follows: "As the king was bound to prosecute, or, at least, to lend the sanction of his name to a prosecutor, whenever a grand jury informed him, upon their oaths, that there was a sufficient ground for instituting a criminal suit; so when his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace or good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the Court of King's Bench by a suggestion on the record, and to carry on the prosecution in his majesty's name."

[*85] *For offences affecting the queen, her ministers, or the state, informations are filed *ex officio* by the attorney-general. The 4 & 5 W. & M. c. 18, greatly abridged the powers of coroners with regard to informations in which a private individual was virtually the prosecutor; but this statute does not affect informations filed *ex officio*. Informations lie for misdemeanors only, for no person whose life is in question, or indeed in any case of treason or felony, can be called upon to answer until the charge has been sanctioned by the oaths of a grand jury.

Informations *ex officio* are filed by the attorney-general alone, though, if there be a vacancy in that office, it may be done by the solicitor-general. They may be filed for any offence, below the degree of felony, which tends to disturb the government, or to interfere with the interests of the public or the safety of the crown, such as libels on the government or crown officers, obstruction of revenue officers, or the bribing of public officers. The attorney-general is the sole judge of what public misdemeanors he will prosecute. The following is the commencement of an information *ex officio*:—

"Be it remembered, that A. B., attorney-general of our sovereign lady the now queen, who for our said lady the queen prosecutes in this behalf, in his proper person comes here into the court of our said lady the queen, before the queen herself at Westminster, in the county of Middlesex, on, &c., and for our said lady the queen giveth the court here

[*86] to understand, and be informed that, &c." *The substance of the charge then follows with the same accuracy and precision as in an indictment, after which it concludes thus: "Whereupon the said attorney-general of our said lady the queen, who for our said lady the queen in this behalf prosecutes, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said C. D., the defendant in this behalf, to make him answer to our said lady the queen touching and concerning the premises aforesaid." The whole is then signed by the attorney-general, and filed in the Crown Office.

The attorney-general having filed his information, it is brought on for trial at such time as is convenient to that officer. In case of unnecessary delay, the defendant may apply to the court to fix a time for the trial.

The case is generally tried at the *Nisi Prius* side of the Queen's Bench. The attorney-general is entitled to a trial at bar, if he prefers it. If the defendant be acquitted, if a *nolle prosequi* be entered, he has to defray his own expenses, as the crown neither receives nor pays costs. Judgment is not pronounced until moved for by the attorney-general. The defendant then, either personally or through his counsel, addresses the court in mitigation of punishment.

We shall now consider informations filed in the name of the master of the Crown Office. The master of the Crown Office stands in the same relation to the public as the attorney-general in relation to the crown. These latter informations may be divided into two classes: namely, those *against magistrates for misconduct in their office, and those filed against private individuals. The jurisdiction over informations [*87] is virtually vested in the Queen's Bench, as the 4 & 5 W. & M. c. 18, prohibits the master of the Crown Office from filing informations without the leave of the court. The court will grant leave to file a criminal information for offences below the degree of felony, which, though they do not affect the government, still materially concern the public welfare. Thus it would be allowed for offences against God, religion, or morality, as for blasphemy or obscene writings, for an imposture, and for conspiring to defraud, attempting to prejudice the minds of a jury by distributing handbills for that purpose, for libelling or obstructing magistrates in the discharge of their duty.

It is necessary now, since the 4 & 5 W. & M. c. 18, to disclose to the court upon affidavits the grounds upon which it is exhibited. The affidavits being prepared, the prosecutor, by his counsel, moves the Court of Queen's Bench for a rule, calling upon the defendant to show cause why leave should not be granted to file an information. If a rule is obtained at the proper time, cause is shown; if the rule is made absolute, the party is then bound to enter into a recognizance to prosecute; the information is then filed. An information may be amended at any time before the trial: after it is filed, the defendant either pleads or demurs, after which issue is joined; and notice of trial being given, the matter is then brought before the court. Either *party may have a special jury if they think fit. Informations of the Crown Office [*88] against magistrates are subjected to the same rules as those against private individuals.

CHAPTER XXIV.

OF THE COURT OF CRIMINAL APPEAL.

PREVIOUSLY to the 11 & 12 Vict. c. 78, when any objection was taken on any indictment for treason or felony concerning which the judge entertained doubts, it was usual to reserve the case for the consideration of all the judges. The Court of Quarter Sessions, however, had no power to reserve questions for the consideration of the judges; conse-

quently, by the 11 & 12 Vict. c. 78, it is enacted, that when any person shall have been convicted of any treason, felony, or misdemeanor before any Court of Oyer and Terminer, or Gaol Delivery, or Court of Quarter Sessions, the judge or commissioner, or justices of the peace, before whom the case was tried, may reserve any question of law for the consideration of the justices of either bench and barons of the exchequer, and may respite the execution of the judgment until the question shall have been decided. The prisoner may until such decision, in the discretion of the judge, be either committed to prison or admitted to bail. The judge or commissioner, or Court of Quarter Sessions, shall state a [*89] case to be remitted *to the said justices and barons, showing what the question of law is which they have to decide; and the said justices and barons have full power and authority to hear and determine the said question or questions, and to reverse, affirm, or amend any judgment, or to arrest the judgment. If the judgment should be reversed, avoided, or arrested, and the defendant shall be in prison, the sheriff or gaoler shall forthwith discharge him.

The third section enacts, that the jurisdiction and authority given to the justices of either bench and barons of the exchequer shall and may be exercised by the said justices and barons, or five of them at least, of whom the lord chief justice of the Court of Queen's Bench, the lord chief justice of the Common Pleas, and the lord chief baron of the Court of Exchequer or one of such chiefs, at least, shall be part. Their judgments are to be delivered in open court, after hearing counsel, if the prosecutor or prisoner desire it. The justices and barons have power to cause the case submitted to them to be sent back and amended. The judge at the trial has authority to reserve, not only questions of law raised by the evidence, but also questions of law which arise upon the record. The court generally sits in the Exchequer Chamber.

11 & 12 VICTORIA, CAP. 42.

An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to persons charged with indictable offences.—August 14, 1848.

WHEREAS it would conduce much to the improvement of the administration of criminal justice within England and Wales if the several statutes and parts of statutes relating to the duties of her Majesty's justices of the peace therein with respect to persons charged with indictable offences were consolidated, with such additions and alterations as may be deemed necessary, and that such duties should be clearly defined by positive enactment: Be it therefore declared and enacted by the queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in all cases where a charge or complaint (A.) shall be made before any one or more of her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place within England or Wales, that any person has committed or is suspected to have committed any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever, within the limits of the jurisdiction of such justice or justices of the peace, or that any person guilty or suspected to be guilty of having committed any such crime or offence elsewhere out of the jurisdiction of such justice or justices is residing or being or is suspected to reside or be within the limits of the jurisdiction of such justice or justices, then and in every such case, if the *person so charged or complained against shall [*92] not then be in custody, it shall be lawful for such justice or justices of the peace to issue his or their warrant (B.) to apprehend such person, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to answer to such charge or complaint, and to be further dealt with according to law: Provided always, that in all cases it shall be lawful for such justice or justices to whom such charge or complaint shall be preferred, if he or they shall so think fit, instead of issuing in

MARCH, 1854.—20

the first instance his or their warrant to apprehend the person so charged or complained against, to issue his or their summons (C.) directed to such person, requiring him to appear before the said justice or justices at a time and place to be therein mentioned, or before such other justice or justices of the same county, riding, division, liberty, city, borough, or place as may then be there; and if after being served with such summons in manner hereinafter mentioned he shall fail to appear at such time and place, in obedience to such summons, then, and in every such case, the said justice or justices, or any other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, may issue his or their warrant (D.) to apprehend such person so charged or complained against, and cause such person to be brought before him or them, or before some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to answer to the said charge or complaint, and to be further dealt with according to law: Provided nevertheless, that nothing herein contained shall prevent any justice or justices of the peace from issuing the warrant hereinbefore first mentioned at any time before or after the time mentioned in such summons for the appearance of the said accused party.

2. And be it enacted, that in all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, or in any creek, harbour, haven, or other place in which the admiralty of England have or claim to have jurisdiction, and in all cases of crimes or offences [*93] committed on land beyond the seas, for which indictment may legally be preferred in any place within England or Wales, it shall be lawful for any one or more of her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place within England or Wales in which any person charged with having committed or with being suspected to have committed any such crime or offence shall reside or be, or shall be supposed or suspected to reside or be, to issue his or their warrant (E.) to apprehend the person so charged, and to cause him to be brought before him or them, or some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to answer to the said charges, and to be further dealt with according to law.

3. And be it enacted, that where any indictment shall be found by the Grand Jury in any Court of Oyer and Terminer or General Gaol Delivery, or in any Court of General or Quarter Sessions of the Peace, against any person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as clerk of the indictments at such Court of Oyer and Terminer or Gaol Delivery, or as clerk of the peace at such sessions, at which the said indictment shall be found, shall at any time afterwards, after the end of the Sessions of Oyer and Terminer or Gaol Delivery or Sessions of the Peace at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate (F.) of such indictment having

been found; and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough, or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required, to issue his or their warrant (G.) to apprehend such person so indicted, and to *cause him to be brought before such justice or [*94] justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law, and afterwards, if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit (H.) him for trial, or admit him to bail, in manner herein-after mentioned; or if such person so indicted shall be confined in any gaol or prison for any other offence than that charged in the said indictment, at the time of such application, and production of the said certificate to such justice or justices as aforesaid, it shall be lawful for such justice or justices, and he and they are hereby required, upon it being proved before him or them upon oath or affirmation that the person so indicted and the person so confined in prison are one and the same person, to issue his or their warrant (I.) directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in his custody until by her Majesty's writ of habeas corpus he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law.

4. And be it enacted, that it shall be lawful for any justice or justices of the peace to grant or issue any warrant as aforesaid or any search warrant on a Sunday as well as on any other day.

5. And be it enacted, that in cases where a justice of the peace for any county, riding, division, liberty, city, borough, or place shall be also justice of the peace for a county, riding, division, liberty, city, borough, or place next adjoining thereto or surrounded thereby, it shall and may be lawful for such justice of the peace to act as such justice for the one county, riding, division, liberty, city, borough, or other place whilst he is residing or happens to be in the other such county, riding, division, liberty, city, borough, or other place, in *all matters and things [*95] hereinbefore or hereafter in this act mentioned; and that all such acts of such justice, and the acts of any constable or other officer in obedience thereto, shall be as valid, good, and effectual in the law to all intents and purposes as if such justice at the time he shall so act as aforesaid were in the county, riding, division, liberty, city, borough, or other place for which he shall so act; and all constables and other officers for the county, riding, division, liberty, city, borough, or place for which such justice shall so act as aforesaid, are hereby authorized and required to obey the warrants, orders, directions, act or acts of such justice which

in that behalf shall be granted, given, or done, and to do and perform their several offices and duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty; and any such constable or other peace officer, or any other person, apprehending or taking into custody any person offending against law, and whom he lawfully may and ought to apprehend or take into custody, by virtue of his office or otherwise, in any such county, riding, division, liberty, city, borough, or place, may lawfully take and convey such person so apprehended and taken as aforesaid to and before any such justice of the peace for such county, riding, division, liberty, city, borough, or place, whilst such justice shall be in such adjoining county, riding, division, liberty, city, borough, or place as aforesaid, and the said constables and other peace officers, and all such other persons as aforesaid, are hereby authorized and required in all such cases so to act in all things as if the said justice of the peace were within the said county, riding, division, liberty, city, borough, or place for which he shall so act.

6. And be it enacted, that it shall be lawful for any justice or justices of the peace acting for any county at large, or for any riding or division of such county, to act as such at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction, and situated within, surrounded by, or adjoining to any such county, riding, or division respectively, and that all and every such act and acts, [*96] matters and things, to be so done by such justice or justices *within such city, town, or precinct, as justice or justices for such county, riding, or division respectively, shall be as valid and effectual in law as if the same had been done within such county, riding, or division respectively, to all intents and purposes whatsoever: Provided always, that nothing in this act contained shall extend to give power to the justices of the peace for any county, riding, or division, not being also justices for such city, town, or other precinct, and not having authority as justice of the peace therein, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever.

7. And whereas doubts have arisen whether the powers given to justices by an act passed in the session of parliament held in the second and third years of the reign of her present Majesty, intituled, *An Act for the better Administration of Justice in detached Parts of Counties*, are applicable to cases of summary jurisdiction and to acts merely ministerial: Be it hereby declared and enacted, that all the acts of any justice or justices, and of any constable or officer in obedience thereto, shall be as good in relation to any detached part of any county which is surrounded in whole or in part by the county for which such justice or justices acts or act, as if the same were to all intents and purposes part of the said county; and all constables and other officers of such detached part are hereby required to obey the warrants, orders, and acts of such justice or justices, and to perform their several duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty.

8. And be it enacted, that in all cases where a charge or complaint

for any indictable offence shall be made before such justice or justices as aforesaid, if it be intended to issue a warrant in the first instance against the party or parties so charged, an information and complaint thereof (A.) in writing, on the oath or affirmation of the informant or of some witness or witnesses in that behalf, shall be laid before such justice or justices: Provided always, that in all cases where it is intended to issue a summons instead of a warrant in the first *instance, it shall not be necessary that such information and complaint shall be in writing, or [*97] be sworn to or affirmed in manner aforesaid, but in every such case such information and complaint may be by parol merely, and without any oath or affirmation whatsoever to support or substantiate the same: Provided also, that no objection shall be taken or allowed to any such information or complaint for any alleged defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justice or justices who shall take the examination of the witnesses in that behalf, as herein-after mentioned.

9. And be it enacted, that upon such information and complaint being so laid as aforesaid the justice or justices receiving the same may, if he or they shall think fit, issue his or their summons or warrant respectively as hereinbefore is directed to cause the person charged as aforesaid to be and appear before him or them, or any other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law; and every such summons (C.) shall be directed to the party so charged in and by such information, and shall state shortly the matter of such information, and shall require the party to whom it is so directed to be and appear at a certain time and place therein mentioned before the justice who shall issue such summons, or before such other justice or justices of the peace of the same county, riding, division, liberty, city, borough, or place as may then be there, to answer to the said charge, and to be further dealt with according to law; and every such summons shall be served by a constable or other peace officer upon the person to whom it is so directed by delivering the same to the party personally, or if he cannot conveniently be met with, then by leaving the same with some person for him at his last or most usual place of abode; and the constable or other peace officer who shall have served the same in manner aforesaid shall attend at the time and place and before the justices in the said summons mentioned, to depose, if necessary, to the service of such summons; and if the person so served shall not be and appear before the justice or justices at the *time and place mentioned in such summons, in obedience to the same, then it shall be lawful for such justice or jus- [*98] tices to issue his or their warrant (D.) for apprehending the party so summoned, and bringing him before such justice or justices, or some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to answer the charge in the said information and complaint mentioned, and to be further dealt with according to law: Provided always, that no objection shall be taken or allowed to any such summons or warrant for any alleged defect therein in substance or in form, or for any variance between it and the evidence

adduced on the part of the prosecution before the justice or justices who shall take the examination of the witnesses in that behalf, as hereinafter mentioned; but if any such variance shall appear to such justice or justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice or justices, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or admit him to bail, in manner hereinafter mentioned.

10. And be it declared and enacted, that every warrant (B.) hereafter to be issued by any justice or justices of the peace to apprehend any person charged with any indictable offence shall be under the hand and seal or hands and seals of the justice or justices issuing the same, and may be directed either to any constable or other person by name, or generally to the constable of the parish or other district within which the same is to be executed, without naming him, or to such constable and all other constables or peace officers in the county or other district within which the justice or justices issuing such warrant has or have jurisdiction, or generally to all the constables or peace officers within such last-mentioned county or district, and it shall state shortly the offence on which it is founded, and shall name or otherwise describe the offender; and it shall order the person or persons to whom it is directed to apprehend the offender, and bring him before the justice or justices issuing the said warrant, or before some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to [*99] answer to *the charge contained in the said information, and to be further dealt with according to law; and it shall not be necessary to make such warrant returnable at any particular time, but the same may remain in force until it shall be executed; and such warrant may be executed by apprehending the offender at any place within the county, riding, division, liberty, city, borough, or place within which the justice or justices issuing the same shall have jurisdiction, or in case of fresh pursuit at any place in the next adjoining county or place, and within seven miles of the border of such first-mentioned county, riding, division, liberty, city, borough, or place, without having such warrant backed as hereinafter mentioned; and in all cases where such warrant shall be directed to all constables or other peace officers within the county or other district within which the justice or justices issuing the same shall have jurisdiction, it shall be lawful for any constable, headborough, tithingman, borsholder, or other peace officer for any parish, township, hamlet, or place within such county or district, to execute the said warrant within any parish, township, hamlet, or place situate within the jurisdiction for which such justice or justices shall have acted when he or they granted such warrant, in like manner as if such warrant were directed specially to such constable by name, and notwithstanding the place in which such warrant shall be executed shall not be within the parish, township, hamlet, or place for which he shall be such constable, headborough, tithingman, borsholder, or other peace officer: Provided always, that no objection shall be taken or allowed to any such warrant for any defect therein in substance or in form, or for any variance

between it and the evidence adduced on the part of the prosecution before the justice or justices who shall take the examinations of the witnesses in that behalf, as hereinafter mentioned; but if any such variance shall appear to such justice or justices to be such that the party charged has been thereby deceived or misled, it shall be lawful for such justice or justices, at the request of the party so charged, to adjourn the hearing of the case to some future day, and in the meantime to remand the party so charged, or to admit him to bail, in manner hereinafter mentioned.

*11. And be it enacted, that if the person against whom any such warrant shall be issued as aforesaid shall not be found [*100] within the jurisdiction of the justice or justices by whom the same shall be issued, or if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place in England or Wales, out of the jurisdiction of the justice issuing such warrant, it shall and may be lawful for any justice of the peace for the county or place into which such person shall so escape or go, or in which he shall reside or be, or be supposed or suspected to be, upon proof alone being made on oath of the handwriting of the justice making such warrant, to make an indorsement (K.) on such warrant, signed with his name, authorizing the execution of such warrant within the jurisdiction of the justice making such indorsement, and which indorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables and other peace officers of the county or place where such warrant shall be so indorsed, to execute the same in such other county or place, and to carry the person against whom such warrant shall have issued, when apprehended, before the justice and justices of the peace who first issued the said warrant, or before some other justice or justices of the peace in and for the same county, riding, division, city, liberty, borough, or place, or before some justice or justices of the county, riding, division, liberty, city, borough, or place where the offence in the said warrant mentioned appears to have been committed: Provided always, that if the prosecutor, or any of the witnesses upon the part of the prosecution, shall then be in the county or place where such person shall have been so apprehended, the constable or other person or persons who shall have so apprehended such person may, if so directed by the justice backing such warrant, take and convey him before the justice who shall have so backed the said warrant, or before some other justice or justices of the same county or place; and the said justice or justices may thereupon take the examinations of such prosecutor or witnesses, and proceed in every respect in manner hereinafter directed with respect to persons charged before a justice or *justices of the peace with an offence alleged to have been committed in another county or place than that in [*101] which such persons have been apprehended.

12. And be it enacted, that if any person against whom a warrant shall be issued in any county, riding, division, liberty, city, borough, or place in England or Wales, by any justice of the peace, or by any judge of her Majesty's Court of Queen's Bench, or justice of Oyer and Termi-

ner or Gaol Delivery, for any indictable offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county or place in that part of the United Kingdom called Ireland, or if any person against whom a warrant shall be issued in any county or place in Ireland, by any justice of the peace, or by any judge of her Majesty's Court of Queen's Bench there, or any justice of Oyer and Terminer or Gaol Delivery, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county, riding, division, liberty, city, borough, or place in that part of the United Kingdom called England or Wales, it shall and may be lawful for any justice of the peace in and for the county or place into which such person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, to indorse (K.) such warrant in manner hereinbefore mentioned, or to the like effect, and which warrant so indorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all constables or other peace officers of the county or place where such warrant shall be so indorsed, to execute the said warrant in the county or place where the justice so indorsing it shall have jurisdiction, by apprehending the person against whom such warrant shall have been granted, and to convey him before the justice or justices who granted the same, or before some other justice or justices of the peace in and for the same county or place, and which said justice or justices before whom he shall be so brought shall thereupon proceed in such manner as if the said person had been apprehended in the said last-mentioned county or place.

[*102] *13. And be it enacted, that if any person against whom a warrant shall be issued in any county, riding, division, liberty, city, borough, or place in England or Wales, by any justice of the peace, or by any judge of her majesty's Court of Queen's Bench, or justices of Oyer and Terminer or Gaol Delivery, for any indictable offence, shall escape, go into, reside, or be, or be supposed or suspected to be, in any of the Isles of Man, Guernsey, Jersey, Alderney, or Sark, it shall be lawful for any officer within the district into which such accused person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, who shall have jurisdiction to issue any warrant or process in the nature of a warrant for the apprehension of offenders within such district, to indorse (K.) such warrant in the manner hereinbefore mentioned, or to the like effect; or if any person against whom any warrant, or process in the nature of a warrant, shall be issued in any of the Isles aforesaid, shall escape, go into, reside, or be, or be supposed or suspected to be, in any county, riding, division, liberty, city, borough, or place in England or Wales, it shall be lawful for any justice of the peace in and for the county or place into which such person shall escape or go, or where he shall reside or be, or be supposed or suspected to be, to indorse (K.) such warrant or process in manner hereinbefore mentioned, and every such warrant or process, so indorsed, shall be a sufficient authority to the person or persons bringing the same, and to all persons to whom

the same respectively was originally directed, and also to all constables and peace officers in the county, district, or jurisdiction within which such warrant or process shall be so indorsed, to execute the same within the county, district, or place where the justice or officer indorsing the same has jurisdiction, and to convey such offender, when apprehended, into the county or district wherein the justice or person who issued such warrant or process shall have jurisdiction, and carry him before such justice or person, or before some other justice or person within the same county or district who shall have jurisdiction to commit such offender to prison for trial, and such justice or person may thereupon proceed in such and the same manner as if the said offender had been apprehended within his jurisdiction.

*14. And be it declared and enacted, that if any person against whom a warrant shall be issued by any justice of the peace for [*103] any county or place within England or Wales or Ireland, or by any judge of her Majesty's Court of Queen's Bench or justice of Oyer and Terminer or Gaol Delivery in England or Ireland, for any crime or offence against the laws of those parts respectively of the United Kingdom of Great Britain and Ireland, shall escape, go into, reside, or be, or be supposed or suspected to be, in any place in that part of the said United Kingdom called Scotland, it shall be lawful for the sheriff or steward depute or substitute, or any justice of the peace of the county or place where such person or persons shall go into, reside, or be, or be supposed or suspected to be, to indorse (K.) the said warrant in manner hereinbefore mentioned, or to the like effect, which warrant so indorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all sheriffs officers, stewards officers, constables, and other peace officers of the county or place where such warrant shall be so indorsed, to execute the same within the county or place where it shall have been so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him into the county or place in England, Wales, or Ireland, where the justice or justices who first issued the said warrant shall have jurisdiction in that behalf, and to carry him before such justice or justices, or before any other justice or justices of the peace of and for the same county or place, to be there dealt with according to law, and which said justice or justices are hereby authorized and required thereupon to proceed in such and the same manner as if the said offender had been apprehended within his or their jurisdiction.

15. And be it enacted, that if any person against whom a warrant shall be issued by the lord justice general, lord chief justice clerk, or any of the lords commissioners of justiciary, or by any sheriff or steward depute or substitute, or justice of the peace, of that part of the United Kingdom of Great Britain and Ireland called Scotland, for any crime or offence against the laws of that part of the United Kingdom, shall escape, go into, reside, or be, *or shall be supposed or suspected to be, [*104] in any county or place in England or in Ireland, it shall be lawful for any justice of the peace in, and for the county or place into which

such person shall escape or go, or where he shall reside or be, or shall be supposed or suspected to be, to indorse (K.) the said warrant in manner hereinbefore mentioned, and which said warrant so indorsed shall be a sufficient authority to the person or persons bringing the same, and to all persons to whom the same was originally directed, and also to all constables and other peace officers of the county or place where the justice so indorsing such warrant shall have jurisdiction, to execute the said warrant in the county or place where it is so indorsed, by apprehending the person against whom such warrant shall have been granted, and to convey him into the county or place in Scotland next adjoining to that part of the United Kingdom called England, and carry him before the sheriff or steward depute or substitute, or one of the justices of the peace, of such county or place, and which said sheriff, steward depute or substitute, or justice of the peace, is hereby authorised and required thereupon to proceed in such and the same manner, according to the rules and practice of the law of Scotland, as if the said offender had been apprehended within such county or place in Scotland last aforesaid.

16. And be it enacted, that if it shall be made to appear to any justice of the peace, by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such justice may and is hereby required to issue his summons (L. 1) to such person, under his hand and seal, requiring him to be and appear at a time and place mentioned in such summons before the said justice, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and no just excuse

[*105] *shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode,) it shall be lawful for the justice or justices before whom such person should have appeared to issue a warrant (L. 2) under his or their hands and seals to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned, in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice shall be satisfied by evidence upon oath or affirmation that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant (L. 3) in the first instance, and which, if necessary, may be backed as aforesaid; and if on the appearance of such person so sum-

moned before the said last mentioned justice or justices, either in obedience to the said summons or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant (L. 4) under his hand and seal commit the person so refusing to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place where such person so refusing shall then be, there to remain, and be imprisoned for any time not exceeding seven days, unless he shall in the meantime consent to be examined and to answer concerning the premises.

17. And be it enacted, that in all cases where any person shall appear or be brought before any *justice or justices of the peace charged with any indictable offence, whether committed in England or [*106] Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.

18. And be it enacted, that after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against *him, and shall say to him these words, or words to the like effect: "Having heard the evidence, [*107]

do you wish to say any thing in answer to the charge? you are not obliged to say any thing unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.), and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: Provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time which by law, would be admissible as evidence against such person.

19. And be it declared and enacted, that the room or building in which such justice or justices shall take such examinations and statement as aforesaid shall not be deemed an open court for that purpose; and it shall be lawful for such justice or justices, in his or their discretion, to order that no person shall have access to or be or remain in such room or building without the consent or permission of such justice or justices, if it appear to him or them that the ends of justice will be best answered by so doing.

20. And be it enacted, that it shall be lawful for the justice or justices before whom any such witness *shall be examined as aforesaid, to [•108] bind by recognizance (O. 1) the prosecutor and every such witness to appear at the next Court of Oyer and Terminer or Gaol Delivery, or Superior Court of a County Palatine, or Court of General or Quarter Sessions of the Peace, at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused; which said recognizance shall particularly specify the profession, art, mystery, or trade of every such person entering into or acknowledging the same, together with his christian and surname, and the parish, township, or place of his residence; and if his residence be in a city, town, or borough, the recognizance shall also particularly specify the name of the street, and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein; and the said recognizance being duly acknowledged by the person so entering into the same, shall be subscribed by the justice or justices before whom the same shall be acknowledged, and a notice (O. 2) thereof, signed by the said justice or justices, shall at the same time be given to the person bound thereby;

and the several recognizances so taken, together with the written information (if any); the depositions, the statement of the accused, and the recognizance of bail (if any) in every such case, shall be delivered by the said justice or justices, or he or they shall cause the same to be delivered to the proper officer of the court in which the trial is to be had, before or at the opening of the said court on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice who is to preside in such court at the said trial shall order and appoint: Provided always, that if any such witness shall refuse to enter into or acknowledge such recognizance as aforesaid, it shall be lawful for such justice or justices of the peace, by his or their warrant (P. 1), to commit him to the county gaol or house of correction for the county, riding, division, liberty, city, borough, or place in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the meantime such witness shall duly enter into such recognizance as aforesaid before some one justice of the peace for the [*109] county, riding, division, liberty, city, borough, or place in which such gaol or house of correction shall be situate: Provided nevertheless, that if afterwards, from want of sufficient evidence in that behalf or other cause, the justice or justices before whom such accused party shall have been brought, shall not commit him or hold him to bail for the offence with which he is charged, it shall be lawful for such justice or justices, or any other justice or justices of the same county, riding, division, liberty, city, borough, or place, by his or their order (P. 2) in that behalf, to order and direct the keeper of such common gaol or house of correction where such witness shall be so in custody, to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly.

21. And be it enacted, that if, from the absence of witnesses, or from any other reasonable cause, it shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, it shall be lawful to and for the justice or justices before whom the accused shall appear or be brought, by his or their warrant (Q. 1), from time to time to remand the party accused for such time as by such justice or justices in their discretion shall be deemed reasonable, not exceeding eight clear days, to the common gaol or house of correction, or other prison, lock-up house, or place of security in the county, riding, division, liberty, city, borough, or place for which such justice or justices shall then be acting; or if the remand be for a time not exceeding three clear days, it shall be lawful for such justice or justices verbally to order the constable or other person in whose custody such party accused may then be, or any other constable or person to be named by the said justice or justices in that behalf, to continue or keep such party accused in his custody, and to bring him before the same or such other justice or justices as shall be there acting at the time appointed for continuing such examination: Provided always, that any such justice or justices may order such accused party to be brought before him or them, or before any other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or

[*110] place, at any time before *the expiration of the time for which such accused party shall be so remanded, and the gaoler or officer in whose custody he shall then be shall duly obey such order: Provided also, that, instead of detaining the accused party in custody during the period for which he shall be so remanded, any one justice of the peace before whom such accused party shall so appear or be brought as aforesaid, may discharge him, upon his entering into a recognizance (Q. 2, 3), with or without a surety or sureties, at the discretion of such justice, conditioned for his appearance at the time and place appointed for the continuance of such examination; and if such accused party shall not afterwards appear at the time and place mentioned in such recognizance, then the said justice, or any other justice of the peace who may then and there be present, upon certifying (Q. 4) on the back of the recognizance the non-appearance of such accused party, may transmit such recognizance to the clerk of the peace of the county, riding, division, liberty, city, borough, or place within which such recognizance shall have been taken, to be proceeded upon in like manner as other recognizances, and such certificate shall be deemed sufficient *prima facie* evidence of such non-appearance of the said accused party.

22. And whereas it often happens that a person is charged before a justice of the peace with an offence alleged to have been committed in another county or place than that in which such person has been apprehended or in which such justice has jurisdiction, and it is necessary to make provision as to the manner of taking the examinations of the witnesses, and of committing the party accused, or admitting him to bail in such a case; be it therefore enacted, that whenever a person shall appear or shall be brought before a justice or justices of the peace in the county, riding, division, liberty, city, borough, or place wherein such justice or justices shall have jurisdiction, charged with an offence alleged to have been committed by him in any county or place within England or Wales wherein such justice or justices shall not have jurisdiction, it shall be lawful for such justice or justices, and he and they are hereby required to examine such witnesses, and receive such evidence in proof of such [*111] charge as shall be produced before him or *them, within his or their jurisdiction; and if in his or their opinion such testimony and evidence shall be sufficient proof of the charge made against such accused party, such justice or justices shall thereupon commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place where the offence is alleged to have been committed, or shall admit him to bail, as hereinafter mentioned, and shall bind over the prosecutor (if he have appeared before him or them) and the witnesses by recognizance accordingly, as is hereinbefore mentioned; but if such testimony and evidence shall not in the opinion of such justice or justices be sufficient to put the accused party upon his trial for the offence with which he is so charged, then such justice or justices shall bind over such witnesses as he shall have examined, by recognizance, to give evidence, as hereinbefore is mentioned, and such justice or justices shall, by warrant (R. 1.) under his or their hand and seal or hands and seals, order such accused party to be taken before some jus-

justice or justices of the peace in and for the county, riding, division, liberty, city, borough, or place where and near unto the place where the offence is alleged to have been committed, and shall at the same time deliver the information and complaint, and also the depositions and recognizances so taken by him or them, to the constable who shall have the execution of such last mentioned warrant, to be by him delivered to the justice or justices before whom he shall take the accused in obedience to the said warrant, and which said depositions and recognizances shall be deemed to be taken in the case, and shall be treated to all intents and purposes as if they had been taken by or before the said last-mentioned justice or justices, and shall, together with such depositions and recognizances as such last-mentioned justice or justices shall take in the matter of such charge against the said accused party, be transmitted to the clerk of the court where the said accused party is to be tried, in the manner and at the time hereinbefore mentioned, if such accused party shall be committed for trial upon the said charge, or shall be admitted to bail; and in case such accused party shall be taken before the justice or justices last aforesaid by virtue of the said last-mentioned *warrant, [*112] the constable or other person or persons to whom the said warrant shall have been directed, and who shall have conveyed such accused party before such last-mentioned justice or justices, shall be entitled to be paid his costs and expenses of conveying the said accused party before the said justice or justices; and upon the said constable or other person producing the said accused party before such justice or justices, and delivering him into the custody of such person as the said justice or justices shall direct or name in that behalf, and upon the said constable delivering to the said justice or justices the warrant, information (if any,) depositions, and recognizances aforesaid, and proving by oath the handwriting of the justice or justices who shall have subscribed the same, such justice or justices to whom the said accused party is so produced, shall thereupon forthwith ascertain the sum which ought to be paid to such constable or other person for conveying such accused party and taking him before such justice or justices, as also his reasonable costs and expenses of returning, and thereupon such justice or justices shall make an order (R. 2.) upon the treasurer of the county, riding, division, or liberty, city, borough, or place, or if such city, borough, or place shall be contributory to the county rate of any county, riding, division, or liberty, then upon the treasurer of such county, riding, division, or liberty respectively to which it is contributory, for payment to such constable or other person of the sum so ascertained to be payable to him in that behalf, and the said treasurer, upon such order being produced to him, shall pay the amount to the said constable or other person producing the same, or to any person who shall present the same to him for payment: Provided always, that if such last-mentioned justice or justices shall not think the evidence against such accused party sufficient to put him upon his trial, and shall discharge him without holding him to bail, every such recognizance so taken by the said first-mentioned justice or justices as aforesaid shall be null and void.

23. And be it enacted, that where any person shall appear or be

brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any [*113] *attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace may, in his discretion, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance (S. 1, 2,) of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave; and in all cases where a person charged with any indictable offence shall be committed to prison to take his trial for the same, it shall be lawful, at any time afterwards, and before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, for the justice or justices of the peace who shall have signed the warrant for his commitment, in his or their discretion, to admit such accused person to bail in manner aforesaid; or if such committing justice or justices shall be of opinion that for any of the offences hereinbefore mentioned the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanors, certify (S. 3) on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required, it shall be lawful for any justice of the peace, attending or being at the gaol or prison where such accused party shall be in custody, on production of such certificate, to [*114] admit *such accused person to bail in manner aforesaid; or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, then such committing justice or justices may make a duplicate of such certificate (S. 4) as aforesaid, and upon the same being produced to any justice of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for such last-mentioned justice to take the recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such gaol or prison, and produced, together with the certificate on the warrant of commitment as aforesaid to any justice of the peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognizance of such accused party, and to order him to be discharged out of custody as

to that commitment, as hereinafter mentioned; and where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those herein-before mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, shall admit him to bail in manner aforesaid, or if he have been committed to prison, and shall apply to any one of the visiting justices of such prison, or to any other justice of the peace for the same county, riding, division, liberty, city, borough, or place, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner aforesaid; and in all cases where such accused person in custody shall be admitted to bail by a justice of the peace other than the committing justice or justices as aforesaid, such justice of the peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to the committing justice or justices, or one of them, to be by him or them transmitted, with the examinations, to the proper officer: Provided, nevertheless, that no justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to *bail, except by order of one of her Majesty's secretaries of state, or by her Majesty's Court of Queen's Bench at [*115] Westminster, or a judge thereof in vacation: Provided also, that when, in cases of misdemeanor, the defendant shall be entitled to a traverse at the next assizes or quarter sessions, and shall not be bound to take his trial until the second assize or sessions, in every such case the recognizance (S. 1,) of bail shall be conditioned that he shall appear and plead at the next assizes or sessions, and then traverse the indictment, and that he shall surrender and take his trial at such second assizes or sessions, unless such accused party shall, before he enter into such recognizance, choose and consent to take his trial at such first assizes or sessions, in which case the recognizance may be in the ordinary form herein-before mentioned.

24. And be it enacted, that in all cases where a justice or justices of the peace shall admit to bail any person who shall then be in any prison charged with the offence for which he shall be so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison a warrant of deliverance (S. 5,) under his or their hand and seal or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper he shall forthwith obey the same.

25. And be it enacted, that when all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice or justices of the peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such justice or justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such justice or justices, such evidence is sufficient to put the accused party upon his trial for an indict-

MARCH, 1854.—21

able offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant (T. 1,) commit him to the common gaol or house of correction for the county, riding, division, *liberty, [*116] city, borough, or place to which by law he may now be committed, or, in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction, to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as herein-before mentioned.

26. And be it enacted, that the constable or any of the constables or other persons to whom the said warrant of commitment shall be directed shall convey such accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with such warrant, to the gaoler, keeper, or governor of such gaol or prison, who shall thereupon give such constable or other person so delivering such prisoner into his custody a receipt (T. 2,) for such prisoner, setting forth the state and condition in which such prisoner was when he was delivered into the custody of such gaoler, keeper, or governor; and in all cases where such constable or other person shall be entitled to his costs or expenses for conveying such person to such prison as aforesaid, it shall be lawful for the justice or justices who shall have committed the accused party, or for any justice of the peace in and for the said county, riding, division, or other place of exclusive jurisdiction wherein the offence is alleged in the said warrant to have been committed, to ascertain the sum which ought to be paid to such constable or other person for conveying such prisoner to such gaol or prison, and also the sum which should reasonably be allowed him for his expenses in returning, and thereupon such justice shall make an order (T. 2,) upon the treasurer of such county, riding, division, liberty, or place of exclusive jurisdiction, or if such place of exclusive jurisdiction shall be contributory to the county rate of any county, riding, or division, then upon the treasurer of such county, riding, or division respectively, or, in the county of Middlesex, upon the overseers of the poor of the parish or place within which the offence is alleged to have been committed, for payment to such constable or other person of the sums so ascertained to be payable to *him in that behalf; and the said treasurer or [*117] overseers, upon such order being produced to him or them respectively, shall pay the amount thereof to such constable or other person producing the same, or to any person who shall present the same to him or them for payment: Provided nevertheless, that if it shall appear to the justice or justices by whom any such warrant of commitment against such prisoner shall be granted as aforesaid that such prisoner hath money sufficient to pay the expenses, or some part thereof, of conveying him to such gaol or prison, it shall be lawful for such justice or justices, in his or their discretion, to order such money or a sufficient part thereof to be applied to such purpose.

27. And be it enacted, that at any time after all the examinations

aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words.

28. And be it enacted, that the several forms in the schedule to this act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.

29. And be it enacted, that any one of the magistrates appointed or hereafter to be appointed to act at any of the police courts of the metropolis, and sitting at a police court within the Metropolitan Police District, and every stipendiary magistrate appointed or to be appointed for any other city, town, liberty, borough, or place, and sitting at a police court or other place appointed in that behalf, shall have full power to do alone whatsoever is authorized by this act to be done by any one or more justice or justices of the peace; and that the several forms in the schedule to this act contained may be varied, so far as it may be necessary to render them applicable to the police courts aforesaid, or to the court or other place of sitting of such stipendiary magistrate; and [*118] that nothing in this act contained shall alter or affect in any manner whatsoever any of the powers, provisions, or enactments contained in an act passed in the tenth year of the reign of his late Majesty King George the Fourth, intituled *An Act for improving the Police in and near the Metropolis*, or in an act passed in the third year of the reign of her present Majesty, intituled *An Act for further improving the Police in and near the Metropolis*, or in an act passed in the same year of the reign of her present Majesty, intituled *An Act for regulating the Police Courts in the Metropolis*, or in an act passed in the fourth year of the reign of her present Majesty, intituled *An Act for better defining the Powers of Justices within the Metropolitan Police District*.

30. And be it enacted, that it shall be lawful for the Lord Mayor of the city of London, or for any alderman of the said city, for the time being, sitting at the Mansion House or Guildhall Justice Rooms in the said city, to do alone any act, at either of the said Justice Rooms, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one justice; and that nothing in this act contained shall alter or affect in any manner whatsoever any of the powers, provisions, or enactments contained in an act passed in the third year of the reign of her present Majesty, intituled *An Act for regulating the Police in the City of London*.

31. And be it enacted, that the chief magistrate of the Metropolitan Police Court at *Bow Street* for the time being shall be a justice of the peace of and for the county of *Berks*, if his name be inserted in the commission of the peace for that county, without possessing the qualifi-

cation by estate required by law in that behalf, and without taking any oath of qualification.

82. And be it enacted, that the town of *Berwick-upon-Tweed* shall be deemed to be within *England* for all the purposes of this Act, but nothing in this Act shall be deemed or taken to extend to *Scotland* or *Ireland*, or to the Isles of *Man*, *Jersey*, or *Guernsey*, save and except the several provisions respectively hereinbefore contained respecting the backing of [*119] warrants, and also nothing in this Act *shall be deemed to alter or affect the jurisdiction or practice of her Majesty's Court of Queen's Bench.

83. And be it enacted, that this Act shall commence and take effect on the second day of *October*, in the year of our Lord one thousand eight hundred and forty-eight.

84. And be it enacted, that the following statutes and parts of statutes shall from and after the day on which this Act shall commence and take effect be and the same are hereby repealed; (that is to say,) a certain Act of Parliament made and passed in the thirteenth year of the reign of his late Majesty King *George the Third*, intituled *An Act for the more effectual Execution of Criminal Laws in the two parts of the United Kingdom*; and a certain other act made and passed in the twenty-eighth year of the reign of his said late Majesty King *George the Third*, intituled *An Act to enable Justices of the Peace to act as such in certain Cases out of the Limits of the Counties in which they actually are*; and so much of a certain other act made and passed in the forty-fourth year of the reign of his said Majesty King *George the Third*, intituled *An Act to render more easy the apprehending and bringing to trial Offenders escaping from one part of the United Kingdom to the other, and also from one County to another*, as relates to the apprehension of Offenders escaping from *Ireland* into *England*, or from *England* into *Ireland*, and to the backing of warrants against such offenders; and so much of a certain other act made and passed in the forty-fifth year of the reign of his said Majesty King *George the Third*, intituled *An Act to amend two Acts of the thirteenth and forty-fourth years of his present Majesty, for the more effectual Execution of the Criminal Laws, and more easy apprehending and bringing to trial Offenders escaping from one part of the United Kingdom to the other, and from one county to another*, as relates to the bailing of Offenders escaping from *Ireland* into *England*, or from *England* into *Ireland*; and also a certain other act made and passed in the fifty-fourth year of the reign of his said late Majesty King *George the Third*, intituled *An Act for the more easy apprehending and trying of Offenders escaping from one part of the United Kingdom to *the other*; and also a certain other act made [*120] and passed in the first year of the reign of his late Majesty King *George the Fourth*, intituled *An Act to amend an Act made in the twenty-eighth year of the reign of King George the Third, intituled "An Act to enable Justices of the Peace to act as such in certain Cases out of the Limits of the Counties in which they actually are;"* and so much of a certain other act made and passed in the third year of the reign of his said late Majesty King *George the Fourth*, intituled *An Act for the more*

speedy Return and Levying of Fines, Penalties, and Forfeitures, and Recognizances estreated, as relates to the Form of Recognizances, and to the notice to be given to persons acknowledging the same; and so much of a certain other act made and passed in the seventh year of the reign of his said late Majesty King George the Fourth, intituled *An Act to enable Commissioners for trying Offences upon the Sea, and Justices of the Peace, to take Examinations touching such Offences, and to commit to safe Custody Persons charged therewith*, as relates to the taking of such examinations, and the commitment of persons so charged, by justices of the peace; and so much of a certain other act made and passed in the said seventh year of the reign of his said late Majesty King George the Fourth, intituled *An Act for improving the Administration of Criminal Justice in England*, as relates to the taking of bail in cases of felony, and to the taking of the examinations and informations against persons charged with felonies and misdemeanors, and binding persons by recognizance to prosecute or give evidence; and so much of a certain act made and passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled *An Act for preventing the vexatious Removal of Indictments into the Court of King's Bench, and for extending the Provisions of an Act of the fifth year of King William and Queen Mary, for preventing Delays at the Quarter Sessions of the Peace, to other indictments, and for extending the Provisions of an Act of the seventh year of King George the Fourth as to taking Bail in cases of Felony*, as relates to the taking of bail in cases of felony; and so much of a certain other act made and passed in the seventh year of the reign of his said late Majesty *King William the Fourth, intituled *An Act for enabling Persons indicted for Felony to make their* [*121] *Defence by Counsel or Attorney*, as relates to the right of parties charged with offences to have copies of the depositions or examinations against them; and all other act or acts or parts of acts which are inconsistent with the provisions of this Act; save and except so much of the said several acts as repeal any other act or parts of acts, and also except as to proceedings now pending to which the same or any of them are applicable.

85. And be it enacted, that this Act may be amended or repealed by any act to be passed in the present session of Parliament.

SCHEDULE

(A.)

Information and complaint for an indictable offence.

to wit. } The information and complaint of C. D. of [Yeoman],
 taken this day of in the year of our Lord 18 ,
 before the undersigned, [one] of her Majesty's justices of the peace in

and for the said [county] of who saith that [*&c., stating the offence*].

Sworn before [me], the day and year first above mentioned, at
J. S.

(B.)

Warrant to apprehend a person charged with an indictable offence.

To the constable of and to all other peace officers in the said
[county] of
WHEREAS A. B. of [labourer] hath this day been charged upon
oath before the undersigned [one] of her Majesty's justices of the peace
in and for the said county of for that he on at did
[*&c., stating shortly the offence*]: These are therefore to command you,
in her Majesty's name, forthwith to apprehend the said A. B., and to
bring him before [me], or some other of her Majesty's justices of the
[**122*] peace in and for *the said [county], to answer unto the said
charge, and to be further dealt with according to law.

Given under my hand and seal, this day of in the year
of our Lord at in the [county] aforesaid.

J. S. (L. S.)

(C.)

Summons to a person charged with an indictable offence.

To A. B. of [labourer].

WHEREAS you have this day been charged before the undersigned, [one]
of her Majesty's justices of the peace in and for the said [county] of
for that you on at [*&c. stating shortly the offence*]:
These are therefore to command you, in her Majesty's name, to be and
appear before me on at o'clock in the forenoon at or
before such other justice or justices of the peace for the same [county]
as may then be there, to answer to the said charge, and to be further
dealt with according to law. Herein fail not.

Given under my hand and seal, this day of in the year
of our Lord at in the county aforesaid.

J. S. (L. S.)

(D.)

Warrant where the summons is disobeyed.

To the constable of and to all other peace officers in the said
[county] of

WHEREAS on the last past A. B. of [labourer] was charged
before the undersigned, [one] of her Majesty's justices of the peace in
and for the said [county] of for that [*&c. as in the summons*]:

And whereas [I] then issued [my] summons to the said A. B., commanding him, in her Majesty's name, to be and appear before [me] on at o'clock in the forenoon at or before such other justice or justices of the peace for the same [county] as might then be there, to answer to the said charge, and to be further dealt with according to law: And whereas the said A. B. hath neglected to be or appear at the time and place appointed in and by the said summons, although it hath now been *proved to me upon oath that the said summons was duly served upon the said A. B.: These are therefore [*123] to command you, in her Majesty's name, forthwith to apprehend the said A. B., and to bring him before me, or some other of her Majesty's justices of the peace in and for the said [county], to answer to the said charge, and to be further dealt with according to law.

Given under my hand and seal, this day of in the year of our Lord at in the [county] aforesaid.

J. S. (L. s.)

(E.)

Warrant to apprehend a person charged with an indictable offence committed on the high seas or abroad.

For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed "on the high seas, out of the body of any county of this realm, and within the jurisdiction of the admiralty of England."

For offences committed abroad for which the parties may be indicted in this country the warrant also may be the same as in ordinary cases, but describing the offence to have been committed "on land out of the United Kingdom, to wit, at in the kingdom of," or "at in the East Indies," or "at in the island of in the West Indies," or as the case may be.

(F.)

Certificate of indictment being found.

I HEREBY certify, that at [a court of Oyer and Terminer and General Gaol Delivery, or a court of General Quarter Sessions of the Peace,] holden in and for the [county] of at in the said [county], on a bill of indictment was found by the Grand Jury against A. B., therein described as A. B. late of [labourer], for that he [&c. stating shortly the offence], and that the said A. B. hath not appeared or pleaded to the said indictment.

Dated this day of 184.

J. D.

Clerk of the Indictments on the circuit; or
Clerk of the peace of and for the said [county].

[*124]

*(G.)

Warrant to apprehend a person indicted.

To the constable of and to all other peace officers in the said
[*county*] of

WHEREAS it hath been duly certified by J. D. clerk of the indictments on the circuit [*or clerk of the peace of and for the [*county*] of*] [*that, &c., stating the certificate*]: These are therefore to command you, in her Majesty's name, forthwith to apprehend the said A. B., and to bring him before [*me*], or some other justice or justices of the peace in and for the said [*county*], to be dealt with according to law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L. S.)

(H.)

Warrant of commitment of a person indicted.

To the constable of and to the keeper of the [Common Gaol, or House of Correction,] at in the said [*county*] of

WHEREAS by [*my*] warrant under my hand and seal, dated the day of after reciting that it had been certified by J. D. [*&c., as in the certificate*], [*I*] commanded the constable of and all other peace officers of the said county, in her Majesty's name, forthwith to apprehend the said A. B. and to bring him before [*me*], the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*], or before some other justice or justices of the peace in and for the said [*county*], to be dealt with according to law: And whereas the said A. B. hath been apprehended under and by virtue of the said warrant, and being now brought before [*me*], it is hereupon duly proved to [*me*] upon oath that the said A. B. is the same person who is named and charged in and by the said indictment: These are therefore to command you the said constable, in her Majesty's name, forthwith to take and safely convey the said A. B. to the said [*House of Correction*] at in the said [*county*], and there to deliver him to the keeper thereof, together with this pre-
[*125] cept; and I hereby command you the said keeper to *receive the said A. B. into your custody in the said House of Correction, and him there safely to keep until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L. S.)

(I.)

Warrant to detain a person indicted who is already in custody for another offence.

To the keeper of the [Common Gaol, or House of Correction,] at
in the said [county] of

WHEREAS it hath been duly certified by J. D., clerk of the indictments on the circuit [or clerk of the peace of and for the county of], that, [*&c.*, *stating the certificate*]: And whereas [*I am*] informed that the said A. B. is in your custody in the said [Common Gaol] at aforesaid, charged with some offence or other matter; and it being now duly proved upon oath before [*me*] that the said A. B. so indicted as aforesaid, and the said A. B. in your custody as aforesaid, are one and the same person: These are therefore to command you, in her Majesty's name, to detain the said A. B. in your custody in the [Common Gaol] aforesaid until by her Majesty's writ of Habeas Corpus he shall be removed therefrom for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under my hand and seal, this day of in the
year of our Lord at in the [county] aforesaid.
J. S. (L. S.)

(K.)

Indorsement in backing a warrant.

to wit. } WHEREAS proof upon oath hath this day been made before me,
of } one of her Majesty's justices of the peace for the said [county]
that the name of J. S. to the within warrant subscribed, is of
the handwriting of the justice of the peace within mentioned: I do
therefore hereby authorise W. T., who bringeth to me this warrant,
*and all other persons to whom this warrant was originally
directed, or by whom it may lawfully be executed, and also all [*126]
constables and other peace officers of the said [county] of to exe-
cute the same within the said last-mentioned [county], (a) and to bring
the said A. B., if apprehended within the same [county], before me, or
before some other justice or justices of the peace of the same county, to
be dealt with according to law.

Given under my hand, this day of 184 .
J. L.

(L. 1.)

Summons of a witness.

To E. F., of [labourer].

WHEREAS information hath been laid before the undersigned, [one] of
her Majesty's justices of the peace in and for the said [county] of

* The words following this Asterisk are to be used only where the justice backing the warrant shall think fit, and may be omitted in backing English warrants in Ireland, Scotland, &c., or in backing Irish or Scotch warrants, &c., in England.

that A. B. [*&c., as in the summons or warrant against the accused*], and it hath been made to appear to me upon [*oath*] that you are likely to give material evidence for the [*prosecution*]: These are therefore to require you to be and to appear before me on next at o'clock in the forenoon at or before such other justice or justices of the peace for the same county as may then be there, to testify what you shall know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L. S.)

(L. 2.)

Warrant where a witness has not obeyed a summons.

To the constable of and to all other peace officers in the said [*county*] of

WHEREAS information having been laid before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*] of [**127*] that A. B. [*&c., as in the summons*]; and it having *been made to appear to [*me*] upon oath that E. F. of [*labourer*] was likely to give material evidence for the prosecution, I did duly issue my summons to the said E. F., requiring him to be and appear before me on at or before such other justice or justices of the peace for the same county as might then be there, to testify what he should know respecting the said charge so made against the said A. B. as aforesaid: And whereas proof hath this day been made before me upon oath of such summons having been duly served upon the said E. F.: And whereas the said E. F. hath neglected to appear at the time and place appointed by the said summons and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before me on at o'clock in the forenoon at or before such other justice or justices of the peace for the same [*county*] as may then be there, to testify what he shall know concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this day of in the year of our Lord at in the [*county*] aforesaid.

J. S. (L. S.)

(L. 3.)

Warrant for a witness in the first instance.

To the constable of and to all other peace officers in the said [*county*] of

WHEREAS information hath been laid before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*] of

that [*&c., as in summons*]; and it having been made to appear to [me] upon oath that E. F. of [labourer] is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence without being compelled so to do: These are therefore to command you to bring and have the said E. F. before me on at o'clock in the forenoon at or before such other justice or justices of the peace for the same [county] as may then be there, to testify what he shall know concerning the said charge so made against the said A. B. as aforesaid.

*Given under my hand and seal, this day of in the year of our Lord at in the [county] aforesaid. [*128]
J. S. (L. S.)

(L. 4.)

Warrant of commitment of a witness for refusing to be sworn or to give evidence.

To the constable of and to the keeper of the [House of Correction] at in the said [county] of

WHEREAS A. B. was lately charged before the undersigned [one] of her Majesty's justices of the peace in and for the said [county] of for that [*&c., as in the summons*]; and it having been made to appear to [me] upon oath that E. F. of was likely to give material evidence for the prosecution, I duly issued my summons to the said E. F., requiring him to be and appear before me on at or before such other justice or justices of the peace as should then be there, to testify what he should know concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before me [or being brought before me by virtue of a warrant in that behalf, to testify as aforesaid], and being required to make oath or affirmation as a witness in that behalf, hath now refused so to do [or being duly sworn as a witness doth now refuse to answer certain questions concerning the premises which are here put to him], without offering any just excuse for such his refusal: These are therefore to command you the said constable to take the said E. F., and him safely to convey to the [House of Correction] at in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [House of Correction] to receive the said E. F. into your custody in the said [House of Correction], and him there safely keep for the space of days for his said contempt, unless he shall in the meantime consent to be examined and to answer concerning the premises; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of in the year of our Lord at in the [county] aforesaid.

J. S. (L. S.)

[*129]

*(M.)

Depositions of witnesses.

THE examination of C. D. of [farmer] and E. F. of
 to wit. } [labourer], taken on [oath] this day of in the year
 of our Lord at in the [county] aforesaid, before the
 undersigned, [one] of her Majesty's justices of the peace for the
 said [county], in the presence and hearing of A. B., who is charged
 this day before [me], for that he the said A. B. on at
 [etc., describing the offence as in a warrant of commitment].

THIS deponent C. D. on his [oath] saith as follows [etc., stating the
 deposition of the witness as nearly as possible in the words he uses.
 When his deposition is complete let him sign it].

And this deponent E. F. upon his oath, saith as follows [etc.].
 The above depositions of C. D. and E. F. were taken and [sworn] before
 me at on the day and year first abovementioned.

J. S.

(N.)

Statement of the accused.

: A. B. stands charged before the undersigned, [one] of her Ma-
 jesty's justices of the peace in and for the [county] aforesaid, this
 day of in the year of our Lord for that he the said A. B.
 on at [etc., as in the Caption of the Depositions]; and the
 said charge being read to the said A. B. and the witnesses for the prosecu-
 tion, C. D. and E. F., being severally examined in his presence, the said
 A. B. is now addressed by me as follows: "Having heard the evidence,
 do you wish to say anything in answer to the charge? you are not obliged
 to say anything unless you desire to do so; but whatever you say will
 be taken down in writing, and may be given in evidence against you upon
 your trial;" whereupon the said A. B. saith as follows:

[Here state whatever the prisoner may say, and in his very words as
 nearly as possible. Get him to sign it if he will.]

A. B.

Taken before me at the day and year first above mentioned.

J. S.

[*130]

*(O. 1.)

Recognizance to prosecute or give evidence.

: BE it remembered, that on the day of in the year of
 our Lord C. D. of in the township of in the said

county, farmer, [or C. D. of No. 2, street, in the parish of
in the borough of surgeon, of which said house he is a tenant,]
personally came before me, one of her Majesty's justices of the peace for
the said county, and acknowledged himself to owe to our sovereign lady
the Queen, the sum of of good and lawful money of Great Britain,
to be made and levied of his goods and chattels, lands and tenements, to
the use of our said lady the Queen, her heirs and successors, if he the
said C. D. shall fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at
before me J. S.

Condition to prosecute.

The condition of the within-written recognizance is such, that whereas
one A. B. was this day charged before me J. S., justice of the peace
within mentioned, for that [*&c.*, as in the caption of the depositions], if
therefore he the said C. D. shall appear at the next Court of Oyer and
Terminer or General Gaol Delivery [or at the next Court of General
Quarter Sessions of the Peace] to be holden in and for the [county] of

* and there prefer or cause to be preferred a bill of indictment for
the offence aforesaid against the said A. B., and there also duly prosecute
such indictment, then the said recognizance to be void, or else to stand
in full force and virtue.

Condition to prosecute and give evidence.

Same as the last form to the asterisk*, and then thus:—"and there
prefer or cause to be preferred a bill of indictment against the said A.
B. for the offence aforesaid, and duly prosecute such indictment, and give
evidence thereon as well to the jurors, who shall then inquire of the said
offence, as also to them who shall pass upon the trial of the said A. B.,
then the said recognizance to be void, or else to stand in full force and
virtue.

** Condition to give evidence.*

[*131]

Same as the last form but one to the asterisk*, and then thus:—"and
there give such evidence as he knoweth upon a bill of indictment to be
then and there preferred against the said A. B. for the offence aforesaid,
as well to the jurors who shall there inquire of the said offence as also
to the jurors who shall pass upon the trial of the said A. B. if the said
bill shall be found a true bill, then the said recognizance to be void, or
else to stand in full force and virtue."

(O. 2.)

Notice of the said recognizance to be given to the prosecutor and his witnesses.

 } TAKE notice, that you C. D. of are bound in the sum
to wit. } of to appear at the next court of [General Quarter
Sessions of the Peace] in and for the county of to be holden at
 in the said county, and then and there [prosecute and] give
evidence against A. B.; and unless you then appear there, and [prose-
cute and] give evidence accordingly, the recognizance entered into by
you will be forthwith levied on you. Dated this day of
184 .

J. S.

(P. 1.)

Commitment of witness for refusing to enter into the recognizance.

To the constable of and to the keeper of the [House of Correc-
tion] at in the said [county] of

WHEREAS A. B. was lately charged before the undersigned, [one] of
her majesty's justices of the peace in and for the said [county] of
for that [&c. as in the summons to the witness], and it having been made
to appear to [me] upon oath that E. F. of was likely to give
material evidence for the prosecution, [I] duly issued [my summons to
the said E. F., requiring him to be and appear] before [me] on
at or before such other justice or justices of the peace as should
then be there, to testify what he should know concerning the said charge
so made against the said A. B. as aforesaid; and the said E. F. now ap-
[*132] pearing before [me], [or being brought before * [me] by virtue of a
warrant in that behalf, to testify as aforesaid,] hath been now ex-
amined by [me] touching the premises, but being by [me] required to enter
into a recognizance conditioned to give evidence against the said A. B.,
hath now refused so to do: These are therefore to command you the said
constable to take the said E. F., and him safely to convey to the [House of
Correction] at in the [county] aforesaid, and there deliver him to
the said keeper thereof, together with this precept; and I do hereby
command you the said keeper of the said [House of Correction] to re-
ceive the said E. F. into your custody in the said House of Correction,
there to imprison and safely keep him until after the trial of the said A.
B. for the offence aforesaid, unless in the meantime such E. F. shall
duly enter into such recognizances as aforesaid, in the sum of
pounds, before some one justice of the peace for the said [county], con-
ditioned in the usual form to appear at the next Court of [Oyer and Ter-
miner or General Gaol Delivery, or General Quarter Sessions of the
Peace,] to be holden in and for the [county] of and there to give
evidence before the grand jury upon any bill of indictment which may

then and there be preferred against the said A. B. for the offence aforesaid, and also to give evidence upon the trial of the said A. B. for the said offence, if a true bill should be found against him for the same.

Given under my hand and seal, this day of in the year of our Lord at in the [county] aforesaid.

(P. 2.)

Subsequent order to discharge the witness.

To the keeper of the [House of Correction] at in the [county] of

WHEREAS by [my] order dated the day of [instant], reciting that A. B. was lately before them, charged before [me] for a certain offence therein mentioned, and that E. F. having appeared before [me,] and being examined as a witness for the prosecution in that behalf, refused to enter into a recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you *safely to keep him until after the trial of the [*133] said A. B. for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid: And whereas, for want of sufficient evidence against the said A. B. the said A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you the said keeper to discharge the said E. F. out of your custody as to the said commitment, and suffer him to go at large.

Given under [my] hand and seal, this day of in the year of our Lord at in the [county] aforesaid.

J. S. (L. s)

(Q. 1.)

Warrant remanding a prisoner.

To the Constable of and to the [Keeper of the House of Correction] at in the said [county] of

WHEREAS A. B. was this day charged before the undersigned, [one] of Majesty's justices of the peace in and for the said [county] of for that [&c., as in the warrant to apprehend]; and it appears to me to be necessary to remand the said A. B. These are therefore to command you the said constable, in her Majesty's name, forthwith to convey the said A. B. to the [House of Correction] at in the said [county], and there to deliver him to the keeper thereof, together with this precept; and I hereby command you the said keeper to receive the said A. B. into your custody in the said House of Correction, and there safely keep him until the day of instant, when I hereby command you to have him at at o'clock in the forenoon of the

same day before me, or before such other justice or justices of the peace for the said [county] as may then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this day of in the year
of our Lord at in the [county] aforesaid.

J. S. (L. S.)

[*134]

*(Q. 2.)

Recognizance of bail instead of remand, on an adjournment of examination.

: Be it remembered, that on the day of in the year of
our Lord A. B. of labourer, L. M. of grocer, and
N. O. of butcher, personally came before me, one of her Majesty's
justices of the peace for the said [county], and severally acknowledged
themselves to owe to our lady the Queen the several sums following;
that is to say, the said A. B. the sum of and the said L. M. and
N. O. the sum of each of good and lawful money of Great Britain,
to be made and levied of their several goods and chattels, lands and tene-
ments respectively, to the use of our said lady the Queen, her heirs and
successors, if he the said A. B. fail in the condition indorsed.

Taken and acknowledged, the day and year first above mentioned, at
before me,

J. S.

Condition.

The condition of the within-written recognizance is such, that whereas
the within-bounden A. B. was this day [or on last past] charged
before me, for that [*&c., as in the warrant*]: And whereas the examina-
tion of the witnesses for the prosecution in this behalf is adjourned until
the day of instant; if therefore the said A. B. shall appear
before me on the said day of instant at o'clock in
the forenoon, or before such other justice or justices of the peace for the
said [county] as may then be there, to answer [further] to the said
charge, and to be further dealt with according to law, then the said re-
cognizance to be void, or else to stand in full force and virtue.

(Q. 3.)

Notice of such recognizance to be given to the accused and his sureties.

: Take notice, that you A. B. of are bound in the sum of
and your sureties L. M. and N. O. in the sum of each, that you
[*185] A. B. appear before me J. S., one of her Majesty's *justices of
the peace for the [county] of on the day of
instant at o'clock in the forenoon, at or before such
other justice or justices of the peace for the same [county] as may then

be there, to answer further to the charge made against you by C. D., and to be further dealt with according to law; and unless you A. B. personally appear accordingly the recognizances entered into by yourself and sureties will be forthwith levied on you and them.

Dated this day of 184 .

J. S.

(Q. 4.)

Certificate of non-appearance to be indorsed on the recognizance.

I hereby certify, that the said A. B. hath not appeared at the time and place in the above condition mentioned, but therein hath made default, by reason whereof the within-written recognizance is forfeited.

J. S.

(R. 1.)

Warrant to convey the accused before a justice of the county, &c., in which the offence was committed.

To W. T., constable of and to all other peace officers in the said [county] of

WHEREAS A. B. of labourer, hath this day been charged before the undersigned, [one] of her Majesty's justices of the peace in and for the said county of for that [&c., as in the warrant to apprehend]: And whereas [I] have taken the deposition of C. D., a witness examined by [me] in this behalf; but inasmuch as [I] am informed that the principal witnesses to prove the said offence against the said A. B. reside in the [county] of C., where the said offence is alleged to have been committed. These are therefore to command you the said constable in her Majesty's name, forthwith to take and convey the said A. B. to the said [county] of C., and there carry him before some justice or justices of the peace in and for that [county], and near unto the [parish of D.], where the offence is alleged to have been committed, to answer further to the said charge before him or them, and to be further dealt with according to *law; and [I] hereby further command you the said constable to deliver to the said justice or justices the information in this [*136] behalf, and also the said deposition of C. D. now given into your possession for that purpose, together with this precept.

Given under my hand and seal, this day of in the year of our Lord at in the [county] aforesaid.

J. S. (L. S.)

(R. 2.)

Order for payment of the constable's expenses.

To R. W., Esquire, treasurer of the said county of C.

WHEREAS W. T. constable of in the county of A., hath by virtue
MARCH, 1854.—22

of and in obedience to a certain warrant of J. S. Esquire, [one] of her Majesty's justices of the peace in and for the said county of A., taken and conveyed one A. B., charged before the said J. S. with having [*&c.*, *stating shortly the offence*], from in the said county of A. to in the said county of C., a distance of miles, and produced the said A. B. before me S. P., one of her Majesty's justices of the peace in and for the said county of C., and delivered him into the custody of by [my] direction, to answer to the said charge, and further to be dealt with according to law: And whereas the said W. T. hath also delivered to [me] the said warrant, together with the information in that behalf, and also the deposition of C. D. in the said warrant mentioned, and hath proved to [me] upon oath the handwriting of the said J. S. subscribed to the same: And whereas [I] have ascertained that the sum which ought to be paid to the said W. T. for conveying the said A. B. from the said county of A. to the said county of C., and taking him before [me], is the sum of and that the reasonable expenses of the said W. T. in returning will amount to the further sum of making together the sum of : These are therefore to order you, as such treasurer of the said county of C., to pay unto the said W. T. the said sum of according to the form of the statute in such case made and provided, for which payment this order shall be your sufficient voucher and authority.

Given under my hand, this day of 184 .

J. P.

[*137]

*(S. 1.)

Recognizance of bail.

BE it remembered, that on the day of in the year of our Lord A. B. of labourer, L. M. of grocer, and N. O. of butcher, personally came before [us] the undersigned, two of her Majesty's justices of the peace for the said [county,] and severally acknowledged themselves to owe to our lady the Queen the several sums following, (that is to say) the said A. B. the sum of and the said L. M. and N. O. the sum of each, of good and lawful money of Great Britain to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said lady the Queen, her heirs and successors, if he the said A. B. fail in the condition indorsed.

Taken and acknowledged, the day and year first, above-mentioned at before us,

J. S.

J. N.

Condition in ordinary cases.

The condition of the within-written recognizance is such, that whereas the said A. B. was this day, charged before [us] the justices within-

mentioned, for that [*&c., as in the warrant*]; if therefore, the said A. B. will appear in the next Court of Oyer and Terminer and general Gaol Delivery [*or Court of general Quarter Sessions of the Peace*] to be holden in and for the county of and there surrender himself into the custody of the keeper of the [*Common Gaol*] there and then plead to such indictment as may be found against him by the Grand Jury, for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

Conditions where the defendant is entitled to a traverse.

The condition of the within-written recognizance is such, that whereas the said A. B. was this day charged before [*me*] the justice within-mentioned, for that [*&c., as in the warrant or summons*]; if therefore the said A. B. will appear at the next Court of General Quarter Sessions of the Peace, * [*or Court of Oyer and Terminer and General Gaol Delivery*] to be holden in and for the county of and [*138] there plead to such indictment as may be found against him by the Grand Jury for or in respect of the charge aforesaid, and shall afterwards at the then next Court of General Quarter Sessions of the Peace [*or Court of Oyer and Terminer and General Gaol Delivery*] surrender himself into the custody of the keeper of the [*house of correction*] there, and take his trial upon the said indictment, and not depart the said Court without leave, then the said recognizance to be void, or else to stand in full force and virtue.

(S. 2.)

Notice of the said recognizance to be given to the accused and his bail.

TAKE notice, that you A. B. of are bound in the sum of and your [*sureties L. M. and N. O.*] in the sum of each, that you A. B. appear, &c. [*as in the condition of the recognizance*] and not depart the said court without leave; and unless you the said A. B. personally appear and plead, and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and them.

Dated this day of 184 J. S.

(S. 3.)

Certificate of consent to bail by the committing justice indorsed on the commitment.

I HEREBY certify, that I consent to the within-named A. B. being bailed by recognizance, himself in and [*two*] sureties in each. J. S.

(S. 4.)

The like on a separate paper.

WHEREAS A. B. was on the committed by me to the [house of correction] at charged with [dec., naming the offence shortly]:

I hereby certify, that I consent to the said A. B. being bailed by recognizance, himself, in and [two] sureties in each. Dated the day of 184 J. S.

[*139]

*(S. 5.)

Warrant of deliverance on bail being given for a prisoner already committed.

To the keeper of the [house of correction] at in the said [county] of .

WHEREAS A. B., late of laboury, hath before [us, two] of her Majesty's justices of the peace in and for the said county, entered into his own recognizance, and found sufficient sureties for his appearance at the next Court of Oyer and Terminer and General Gaol Delivery [or Court of General Quarter Sessions of the Peace] to be holden in and for the county of to answer our sovereign lady the Queen, for that [dec., as in the commitment,] for which he was taken and committed to your said [house of correction]: These are therefore to command you, in her said Majesty's name, that if the said A. B. do remain in your custody in the said [house of correction] for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of in the year of our Lord at in the [county] aforesaid.

J. S. (L. S.)
J. N. (L. S.)

(T. 1.)

Warrant of commitment.

To the constable of and to the keeper of the [house of correction] at in the said [county] of .
WHEREAS A. B. was this day charged before me J. S., one of her Majesty's justices of the peace in and for the said [county] of on the oath of C. D. of farmer, and others, for that [dec., stating shortly the offence]: These are therefore to command, you the said constable of to take the said A. B., and him safely to convey to the [house of correction] at aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the

said A. B. into your custody in the said [house of correction], and there safely keep *him until he shall be hence delivered by due course [*140] of law.

Given under my hand and seal, this day of in the year of our lord at in the [county] aforesaid.

J. S. (L. S.)

(T. 2.)

Gaoler's receipt to the constable for the prisoner, and justice's order thereon for payment of the constable's expenses in executing the commitment.

I HEREBY certify that I have received from W. T. constable of the body of A. B., together with a warrant under the hand and seal of J. S., Esquire, one of her Majesty's justices of the peace for the [county] of ; and that the said A. B. was [sober, or as the case may be] at the time when he was so delivered into my custody.

P. K.

Keeper of the house of Correction
[or Common Gaol] at

CONSTABLE'S EXPENSES:

	£.	s.	d.
For conveying the above A. B. from to [by railway] at per mile.			
For conveying him to and from the railway station.			
For subsistence of prisoner whilst in custody after com- mitment days, at per day.			
For his lodging nights at per night.			
Constable days, at per day.			
[One] assistant [if necessary] days, at per day.			

Total £

To R. W. Esquire, treasurer of the said [county] of .

WHEREAS W. T. constable of in the county of , hath produced unto me J. P., one of her Majesty's justices of the peace in and for the said county of (wherein the offence hereinafter mentioned is alleged to have been *committed) the above receipt of P. K., [*141] keeper of the [house of correction] at : And, whereas [*141] in pursuance of the statute in such case made and provided, I have ascertained that the sum which ought to be paid to the said W. T. for conveying the said A. B. from in the said county of to the said [house of correction] is and that the reasonable expenses of the said W. T. in returning will amount to the further sum of making together the sum of : These are therefore to order you, as such treasurer of the said county of to pay unto the said W. T. the said sum of according to the form of the statute in

such case made and provided, for which payment this order shall be your sufficient voucher and authority.

Given under my hand, this day of 184 .

J. P.

Received the day of 184 of the treasurer of the
[county] of the sum of being the amount of the above
order.

£

[*142]

*14 & 15 VICTORIA, CAP. 100.

An Act for further improving the Administration of Criminal Justice.
—August 7, 1851.

WHEREAS offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: And whereas such technical strictness may safely be relaxed in many instances, so as to insure the punishment of the guilty, without depriving the accused of any just means of defence: And whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had, and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the coming of this Act into operation, whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, [*143] which shall form the subject of any offence charged therein, or in *the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the

court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: Provided that in all such cases where the trial shall be so postponed as aforesaid it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the *defendant shall [*144] be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purposes in such and the same manner, as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

2. Every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.

8. If it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provision of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

4. In any indictment for murder or manslaughter preferred after the coming of this Act into operation it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice

aforethought kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased.

5. In any indictment for forging, uttering, stealing, embezzling, destroying, or concealing, or for obtaining, by false pretences, any instrument, it shall be sufficient to describe such instrument by name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof.

[*145] *6. In any indictment for engraving or making the whole or any part of any instrument, matter or thing whatsoever, or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter or thing.

7. In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.

8. From and after the coming of this Act into operation, it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud.

9. And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof: For remedy thereof be it enacted, that if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only [*146] of an *attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in

the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried.

10. And whereas it is enacted by a certain act of parliament passed in the first year of the reign of her present Majesty Queen Victoria, intituled *An Act to amend the Laws relating to Offences against the Person*, that "on the trial of any person for any of the offences therein-before mentioned, or for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding:" And whereas great difficulties have arisen in the construction of such enactment: For remedy therefore be it enacted, that the said enactment shall be, and the same is hereby repealed.

11. If upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried, as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.

12. If upon the trial of any person for any misdemeanor it shall appear that the facts given in *evidence amount in law to a felony, such person shall not by reason thereof be entitled to be ac- [*147] quitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court, before which such trial may be had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.

13. If upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner, as if he had been convicted upon an indictment for such larceny; and, if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty

to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement or larceny, as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

14. If upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part of such property.

[*148] *15. And whereas it frequently happens that the principal in a felony is not in custody or amenable to justice, although several accessaries to such felony or receivers, at different times, of stolen property, the subject of such felony may be in custody or amenable to justice: For the prevention of several trials be it enacted, that any number of such accessaries or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

16. It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed therein for all or any of them.

17. If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

18. In every indictment in which it shall be necessary to make any averment as to any money, or any note to the Bank of England, or any other bank, it shall be sufficient to describe such money, or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved, and in cases of *embezzlement and obtaining money or bank [*149] notes by false pretences, by proof that the offender embezzled, or obtained any piece of coin, or any bank note, or any portion of the value thereof, although such piece of coin, or bank note, may have been delivered to him in order that some part of the value thereof should be re-

turned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

19. Whereas by an act of parliament passed in *England*, in the twenty-third year of the reign of his late Majesty King *George the Second*, intituled *an Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual*, and by a certain other act of parliament made in *Ireland* in the thirty-first year of the reign of his late Majesty King *George the Third*, intituled *An Act to render Prosecutions for Perjury and Subornation of Perjury more easy and effectual, and for affirming the Jurisdiction of the Quarter Sessions in cases of Perjury*, certain provisions were made to prevent persons guilty of perjury and subornation of perjury, from escaping punishment by reason of the difficulties attending such prosecutions: And whereas it is expedient to amend and extend the same: Be it enacted that, it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of her Majesty's justices or commissioners of assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, or for any justices of the peace, recorder or deputy recorder, chairman, or other judge, holding any General or Quarter Sessions of the Peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court or any court of record, or for any justices of the peace in Special or Petty Sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and *to commit such person so directed to be prosecuted until the next [*150] Session of Oyer and Terminer, or Gaol Delivery for the county, or other district, within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of Oyer and Terminer or Gaol Delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person, he or they may think fit, to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute, a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last mentioned court shall specially otherwise direct; and when allowed by any such court in *Ireland*, such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the

same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: Provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

20. In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bail, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was [*151] taken, made, signed, or subscribed, *without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

21. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

22. A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer, (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken,) shall upon the trial of any indictment for perjury, or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

23. It shall not be necessary to state any venue in the body of any indictment, but the county, city, *or other jurisdiction named in [*152] the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall

be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue.

24. No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute" instead of "against the form of the statutes," or vice versâ, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence.

25. Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, *if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court [*153] or other person, and thereupon the trial shall proceed as if no such defect had appeared.

26. So much of a certain act of parliament passed in the sixtieth year of the reign of his late Majesty King *George the Third*, intituled *an Act to Prevent Delay in the Administration of Justice in cases of Misdemeanor*, as provides that "where any person shall be prosecuted for any misdemeanor by indictment at any Session of the Peace, Session of Oyer and Terminer, Great Session, or Session of Gaol Delivery, within that part of *Great Britain* called *England*, or in *Ireland*, having been committed to custody or held to bail to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon, at such same Session of the Peace, Session of Oyer and Terminer, Great Session, or Session of Gaol Delivery respectively, unless a writ of certiorari for removing such indictment into His Majesty's Court of King's Bench at *Westminster* or in *Dublin* shall be delivered at such session before the jury shall be sworn for such trial," shall be and the same is hereby repealed.

27. No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any Session of the Peace, Session of Oyer and Terminer, or Session of Gaol Delivery: Provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose.

28. In any plea of autrefois convict or autrefois acquit it shall be [*154] sufficient for any defendant to state that he has been lawfully convicted or *acquitted (as the case may be) of the said offence charged in the indictment.

29. Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm; any attempt to have carnal knowledge of a girl under twelve years of age; any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

30. In the construction of this Act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any Nisi Prius record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and the "making a presentment;" and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing; and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.

31. This Act shall come into operation on the first day of *September* one thousand eight hundred and fifty-one.

32. Nothing in this Act shall extend to *Scotland*.

INDEX.

The pages referred to are those between brackets [].

- ACCESSARIES.**
 - before the fact and after, 23.
- ACCOMPLICE.**
 - competent witness, 52.
- ACQUITTAL.**
 - see **PRISONER.**
- AFFIRMATION.**
 - by Quaker, 51.
- ARRAIGNMENT.**
 - see **PRISONER.**
- ARREST.**
 - who may arrest offenders, 5.
 - when and where, 5.
 - by justice of peace, 6.
 - by sheriff, 6.
 - by coroner, 6.
 - by constable, 5.
- ARSON.**
 - definition of, 23.
- BIGAMY.**
 - what, 23.
- BILL.**
 - what, 32.
 - how presented, 32.
- BURGLARY.**
 - what, 23.
- CAPTION.**
 - see **INDICTMENT.**
- CERTIORARI.**
 - writ of, 38, 39.
 - where returnable, 39.
 - when proper time to apply for, 39.
- CONSPIRACY.**
 - what, 23.
- COURT OF CRIMINAL APPEAL.**
 - statute regulating, 89.
 - powers and duties of, 89.
- COURTS.**
 - Queen's Bench, 19.
 - General Gaol Delivery, 19.
 - Quarter Sessions, 20.
- CRIMES.**
 - division of, 1.
- concealing, 3.
- DEPOSITIONS.**
 - see **WITNESS.**
- EMBEZZLEMENT.**
 - what, 24.
- ERROR.**
 - writ of, 75.
 - when and how grantable 75
 - amendment of, 75, 76.
- EVIDENCE.**
 - rules of, 57—65.
- EXAMINATIONS, 9.**
 - where taken, 12.
- FALSE PRETENCES.**
 - what, 24.
- FELONY.**
 - what, 2.
 - new trial for, 72.
- FORGERY.**
 - what, 24.
- GRAND JURY.**
 - qualification for, 32.
 - disqualifications of, 33.
 - summoning of, 33.
 - oath of, 34.
 - true bill by, 36.
- HABEAS CORPUS.**
 - act of, 18.
 - different kinds of, 18.
- HOMICIDE.**
 - what, 24.
- INDICTMENT.**
 - what, 25.
 - requisites of, 26.
 - amendments of, 26.
 - venue of, 27.
 - technical words in, 28.
 - forms of, 29—32.
 - caption of, 37, 38.
 - removal of, 38.
 - pleadings upon, 41.
- INFANTS.**
 - when guilty of felony, 21.

INFORMATION.

- form of, 7.
- kinds of criminal informations, 83—85.
- forms of, 86.
- for what filed, 87.

INSANITY.

- kinds of, 22.

JUDGMENT.

- arrest of, 73.
- when given, 73.
- how entered, 74.

JURISDICTION.

- pleas to, 41.

JURY.

- for Grand Jury, *see* **GRAND JURY**.
- Petit, 44.
- qualifications for, 45.
- de medietate lingue*, 45.
- challenge to, 46.
- kinds of challenge, 47.
- oath of, 48.

LARCENY.

- what, 24.

LIBEL.

- what, 24.

MANSLAUGHTER.

- what, 24.

MISDEMEANOR.

- what, 1.
- compromising, 3.
- new trial for, 72.

MURDER.

- what, 24.
- form of record for, 76—81.

OATH.

- form of, to witnesses, 10.
- of Grand Jury, 34.
- of Petit Jury, 48.

PARDON.

- 81—83.

PERJURY.

- what, 25.

PLEAS.

- dilatory, 41.
- to the jurisdiction, 41.
- special, 42.
- autrefois acquit*, 42.
- autrefois convict*, 43.
- not guilty, 44.

PRISONER.

- statement of, 11.
- commitment of, 17.
- arraignment of, 40.
- when discharged, 69.
- acquittal of, on ground of insanity, 69.

PROSECUTION, 3.**PROSECUTOR.**

- duties of, 3.

PUBLIC OFFICER.

- concealing felony, 3.

- requiring aid, 5.

RAPE.

- what, 24.

RECOGNIZANCE.

- form of, 12.
- notice of, 13.
- of bail, 15.

RECORD.

- how made up, 74.
- form of, for murder, 76—81.

REPRIEVE.

- kinds of, 81.

RESCUE.

- what, 9.

RIOT.

- what, 25.

ROBBERY.

- what, 25.

SECRETARY OF STATE.

- may issue warrant, 6.

SHERIFF.

- arrest by, 6.

SODOMY.

- what, 25.

SPEAKERS OF HOUSE OF COMMONS AND LORDS.

- may issue warrant, 6.

STATEMENT OF PRISONER.

- trial (new), form of, 11.
- when granted, 71, 72.
- for misconduct of jurors, 72.

SUBORNATION OF PERJURY.

- what, 25.

STOLEN GOODS, RECEIVING OF.

- what, 25.

SUMMONS.

- form of, 8.

TREASON.

- what, 1.
- statute against, 1, 2.

VENIRE FACIAS DE NOVO.

- what, 72.

VERDICT.

- how delivered, 65.
- general, 66.
- special, 67.
- reconsidering, 68.
- when recorded, 69.

WARRANT.

- to apprehend, 7.
- where summons is disobeyed, 8.
- on deliverance on bail, 16.
- of commitment of prisoner, 17.

WITNESS.

- deposition of, 10.
- commitment of, 13.
- order to discharge, 14.
- exception to, 50.
- oath to, 53.
- accomplice, 54.

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